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In The

# Supreme Court of the United States

October Term, 1997

ROBERT DUPRE AND W. HAROLD SELLERS,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. When the indictment for making false statements to a federally insured financial institution under 18 U.S.C. § 1014 specifically characterizes the statements as material, must the issue of materiality be submitted to the jury, notwithstanding this Court's decision in *United States v. Wells*.

2. Whether or not the Fifth Circuit's application of the "plain error" standard of review to the district court's failure to instruct the jury on the requirement of materiality of false statements under 18 U.S.C. § 1344 was erroneous.

3. Whether or not materiality of the "pretenses representations or promises" is an element of an offense under 18 U.S.C. § 1344.

4. Whether or not multiple counts under §§ 1014 and 1344 based upon the same factual allegations are multiplicitous and violate the Fifth Amendment's guarantee against double jeopardy.

5. Whether or not the district court's expansive definition of an "agent" was erroneous and made possible conviction of the petitioners upon factual findings of conduct which was not intended to be made criminal under 18 U.S.C. § 215(a)(1).

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## PETITION FOR WRIT OF CERTIORARI

Robert Dupre and W. Harold Sellers respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *United States v. Dupre*, 117 F.3d 810 (5th Cir. 1997). (App. 1).

## JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on July 11, 1997. The Court of Appeals denied a timely petition for rehearing on September 8, 1997. (App. 36). Pursuant to Supreme Court Rule 13.1, this petition has been timely filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the United States Constitution

Sixth Amendment to the United States Constitution

18 U.S.C. § 215(a)(1)

18 U.S.C. § 1014

18 U.S.C. § 1344

## STATEMENT OF THE CASE

The district court had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231.

Petitioners Robert Dupre and W. Harold Sellers were originally indicted, together with Michael Barrack, on a six count indictment charging them with one count of conspiracy in violation of 18 U.S.C. § 371, two counts of bank fraud in violation of 18 U.S.C. § 1344, and three counts of making false statements to a federally insured financial institution in violation of 18 U.S.C. § 1014. Subsequently, the government added by superseding indictment nine counts of money laundering in violation of 18 U.S.C. § 1957 and a sixteenth count seeking forfeiture of the laundered funds in the event of conviction on Counts 7-15.

Prior to trial, Michael Barrack pled guilty to one count charging conspiracy to make false statements to a federally insured bank.

On August 1, 1994, jury trial commenced on the Third Superseding Indictment. (App. 38). Following a three week trial, the jury returned a verdict of guilty against Petitioners Dupre and Sellers on Counts 1-4 and 6-15, but returned a verdict of not guilty on Count 5. The jury subsequently returned a verdict that $7,068,000 is subject to forfeiture by the defendants.

The underlying factual basis for this case is to be found in a series of real estate transactions in which Petitioners Dupre and Sellers were involved in the late '80s. Throughout the 1980s, Dupre, Sellers and Barrack participated as partners in a number of successful real estate investments, principally in Houston, Texas.

In early 1987, the three associates became interested in real estate opportunities in an area known as the Inland Empire, located in Southern California. In order to facilitate investment in California, several corporations were formed, including LaJolla Pacific Equities, Inc. ("LJPE"), a California corporation of which each held approximately one-third of the shares. During 1987 and 1988, LJPE acquired four tracts of land in the Inland Empire, known as Rancho Etiwanda, Sunrise Ranch, Loma Linda Hills, and Moreno Valley. Financing for all four of these properties (as well as other properties owned by entities controlled by Sellers, Barrack, and Dupre) was obtained from Lomas & Nettleton ("L&N"), a private lender located in Dallas, Texas.

In April or May of 1988, Dupre discovered that Barrack had begun doing real estate deals outside of his association with Dupre and Sellers. Following a confrontation, Dupre and Sellers informed Barrack that following the sale of the four Inland Empire properties by LJPE, they intended to end their association with him.

Dupre and Sellers intended, however, to continue to invest in real estate in Southern California. In June of 1988, the two men acquired through Minter Interests, Inc. ("Minter"), an entity in which Michael Barrack had no interest, an option to purchase for $1.5 million a tract of

land which came to be known as the Upper Etiwanda property. On June 30, 1988, Minter and LJPE executed an earnest money contract giving LJPE the right to purchase the Upper Etiwanda property for approximately $6.2 million, the full market price of the property at the average per acre price prevailing at that time in the area. The price was set for this transfer in order to prevent Michael Barrack from sharing in any profit to be realized on this acquisition.

Subsequently, Landmark of California, Inc. ("LOCAL"), a wholly owned subsidiary of Landmark Land Company, Inc. ("Landmark"), the parent of a corporate conglomerate which also includes Oak Tree Savings Bank ("OTSB") and Oak Tree Mortgage Corporation ("OTMC"), contacted LJPE about purchasing LJPE's California properties, which LOCAL valued at over $90 million. These contacts were made by Ernie Vossler, president of LOCAL, and his employee, LOCALS vice president John Ohanian. Over the course of the discussions between LOCAL and LJPE which spanned several weeks, the deal evolved from LOCAL purchasing the properties from LJPE to LOCAL arranging for refinancing of the original four properties and for financing of the acquisition of the Upper Etiwanda tract.

This financing was arranged by Vossler through Landmark's OTMC, which is not a federally insured institution. OTMC agreed to lend LJPE $69 million to refinance the L&N loans on the four original properties, finance the acquisition of Upper Etiwanda, and pay various loan fees and interest reserves. In return for arranging the $69 million package, LOCAL would acquire options to purchase the Sunrise Ranch and Etiwanda

properties, and the Landmark entities would also acquire a right of first refusal and a participation in the profits realized on the properties. Additionally, John Ohanian was to receive $75,000.

In December of 1988, the various transactions were closed. On December 14, 1988, Minter exercised its option to purchase Upper Etiwanda at an ultimate cost of $2.6 million. On December 14, 1988, Minter transferred Upper Etiwanda to LJPE in exchange for profit participations in other properties which participations were worth at least $6.2 million at contemporaneous market prices. On December 21, 1988, the loan documents on the $69 million loan agreement by and between LJPE and OTMC were executed. Following the closing of the loan, Ohanian received $75,000. Dupre and Sellers both testified that this amount was paid following closing on instructions from Vossler, and upon Vossler's representations that this was a preferred manner of compensation for LOCAL's employees.

Subsequently, OTMC transferred the loan to OTSB, which is a federally insured institution. Whether or not Dupre and Sellers knew or should have known that OTSB would ultimately be involved in the loan was a contested issue at trial.

Following the distribution of the loan proceeds, LJPE received approximately $4.4 million. Dupre and Sellers each wired their shares of these proceeds to various bank accounts, including accounts in the Cayman Islands. The $4 million which represents the approximate difference between the cost of acquisition by Minter of Upper Etiwanda in the amount of $2.6 million and the financed

cost of acquisition by LJPE of $6.2 million forms the basis of one of the fraudulent misrepresentations charged in Count 2, and also the false statement charged in Count 4 of the indictment. Additionally, these funds received by LJPE as a direct disbursement from the loan proceeds would appear to be the source of the funds allegedly laundered as charged in Counts 7-12 of the indictment.

$55 million of the loan proceeds was disbursed to L&N in payment of the earlier loans on the four original properties. Dupre, Sellers and Barrack were successful in their attempts (of which attempts Landmark was aware prior to the closing) to receive a discount on the L&N loan payouts in settlement of LJPE's claims against L&N on these and other loans. As a result, approximately $3 million was transferred back to LJPE by L&N. This $3 million was divided evenly between Barrack, Dupre, and Sellers, and wired into corporate accounts in the Cayman Islands, except for approximately $200,000 which was put into LJPE's bank account. The $3 million discount forms the basis of one of the fraudulent misrepresentations charged in Count 2, and also the false statement charged in Count 5 (upon which Dupre and Sellers were acquitted). Additionally, the $3 million received from L&N as a discount on its loan payout would appear to be the source of funds allegedly laundered as charged in Counts 13-15 of the indictment.

In March of 1989, LOCAL exercised its options to purchase the Sunrise Ranch, Rancho Etiwanda and Upper Etiwanda. The portions of the $69 million loan attributable to these properties was paid off at that time. LJPE also received some of the proceeds of these sales. LJPE was, however, required to put $3.8 million of these proceeds

into a certificate of deposit held jointly by OTSB and LJPE as collateral for the still remaining Loma Linda and Moreno loans.

Dupre and Sellers continued to invest in real estate in California. The acquisition of one property by Inland Pacific Real Estate, Inc. ("IPRE"), another entity incorporated by Dupre and Sellers following the split with Barrack, was also financed by OTMC. Following the closing of the loan, IPRE paid Ohanian $80,000. Again Dupre and Sellers testified that they acted upon instructions from Vossler and upon his representations that this was a preferred method of compensation for LOCAL employees. This $80,000 payment, together with the $75,000 payment made to Ohanian following closing of the $69 million loan, forms the basis of one of the objects of the conspiracy charged in Count 1 of the indictment. In separate proceedings, John Ohanian pleaded guilty to violation of 18 U.S.C. § 215(b).

Dupre and Sellers continued to seek other opportunities for real estate investment. In August of 1989, Dupre and Sellers were pursuing at least four other such opportunities, but required cash for down payments and other expenses. They sought the release of $1.5 million from the certificate of deposit securing the Loma Linda loan and OTSB agreed. Following release of the monies, Dupre and Sellers secured contracts on two of the properties, using approximately $700,000 of the released funds. Subsequently, Dupre and Sellers were unable to secure contracts on the remaining two pieces of properties, at least in part because they were informed by Vossler that due to changes in the law (more specifically passage of FIRREA in August of 1989), Landmark would not be able

to assist them in securing financing for the ultimate acquisition of the properties. Dupre and Sellers received no instructions regarding the remaining $800,000 released by OTSB and these funds were not returned to the certificate of deposit which continued to serve as additional collateral on what was by this point in time the sole remaining portion of the $69 million loan, namely the Loma Linda loan. This $1.5 million release of collateral forms the basis of both the fraudulent representation alleged in Count 3 and the false statement alleged in Count 6 of the indictment.

## REASONS FOR GRANTING THE WRIT

**I. The Fifth Circuit's opinion conflicts with relevant decisions of this Court, including its decision rendered in *U.S. v. Stirone*, by affirming Petitioners' convictions notwithstanding the jury instructions delivered by the district court which served to amend the indictment returned by the grand jury in violation of Petitioners' rights secured by the Fifth Amendment.**

Counts 4 and 6 of the Indictment each charged Petitioners Dupre and Sellers with making "a material false statement" to a federally insured institution in violation of 18 U.S.C. § 1014. Notwithstanding this assertion, which was contained in the indictment, the district court, acting pursuant to then controlling Fifth Circuit precedent, instructed the jury as follows:

> "If you find that the government has proved these things, you need not consider whether the false statement was a material false statement,

> even though that language is used in the indictment. This is not a question for the jury to decide."

While, this Court has ruled in *United States v. Wells*, ___ U.S. ___, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997), that materiality of the false statement is not an essential element of an offense under § 1014, petitioners assert that the prosecution made materiality of the false statement an element of the crime in this case by including that assertion in the indictment with respect to each of Counts 4 and 6. It is clear that if materiality of the statements was an element of the crimes as charged in this case, failure to instruct the jury regarding materiality was erroneous. U.S. Constitution, Sixth Amendment; and *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

To amend the language of an indictment so as to broaden the possible bases for conviction in any way other than by action of the grand jury itself is a violation of a defendant's right to be tried only upon grand jury indictment which is secured by the Fifth Amendment. *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). On its face, deletion of the requirement that the false statements be material would appear to broaden the possible bases of conviction, allowing the jury to convict under circumstances where defendants' statements were in fact immaterial. The question of materiality raised specifically by the language of the indictment was particularly important in this case. Petitioners' defense to the charge of the alleged misrepresentation of the purchase price of the Upper Etiwanda property in large measure centered around the immateriality of the

alleged misrepresentation, given the relationship between the various Landmark corporate entities, the interest in LOCAL of acquiring the property at a price based upon Landmark's own valuation, and the funding of the loans based upon Landmark's own internal valuations rather than upon any representations made by defendants.

Whether or not petitioners' convictions for violation of § 1014 must be reversed for failure to charge the jury on "materiality", on the basis of the materiality language found in the indictment itself and notwithstanding the ruling of the Court in *Wells* with respect to § 1014 generally, is a question which this Court declined to address in *Wells*. Instead, the matter was remanded to the Eighth Circuit Court of Appeals.

Relying upon this Court's decisions in *Ford v. U.S.*, 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793 (1927) and *U.S. v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985), the Eighth Circuit has found the indictment's qualification of the false statement as "material" to be surplusage. Since "materiality" is not a statutory element of an offense under § 1014, the Court reasoned that its deletion from the indictment by way of the district court's jury instructions did not offend the Fifth Amendment. *U.S. v. Wells*, 1997 WL 629860 (8th Cir. Mo.).

When this issue was presented to the Fifth Circuit Court of Appeals in this case by way of Petition for Rehearing, the Fifth Circuit declined to grant rehearing.

While no other circuit has as yet decided this precise issue, the Eleventh Circuit's opinion in *United States v. Cancelliere*, 69 F.3d 1116 (11th Cir. 1995) would appear to

create a potential conflict among the circuits. In *Cancelliere*, the Eleventh Circuit found the redaction of the indictment from "knowingly and willfully" to simply "knowingly" by way of jury instruction was a violation of the Fifth Amendment, notwithstanding the fact that "willfully" is not a statutory element of the offense of money laundering charged in the indictment. The Eleventh Circuit was convinced that deletion of the "willful" language of the indictment more closely resembled an impermissible broadening of the possible bases of conviction than the simple elimination of unnecessary averments permitted by *Miller*.

Whether or not indictments under 18 U.S.C. § 1014 which specifically include an allegation of materiality in the language of the indictment are required to be tried to the jury on the issue of the materiality, notwithstanding this Court's decision in *Wells*, is an important issue of federal law which should be settled by this Court, particularly in light of the apparent conflict among the circuits.

## II. The opinion of the Fifth Circuit Court of Appeals conflicts with the decision of this Court in *U.S. v. Gaudin*.

Counts 2 and 3 of the indictment charged petitioners Dupre and Sellers with bank fraud in violation of 18 U.S.C. § 1344. The law of the Fifth Circuit was at the time of trial and is still to the effect that materiality of the false and fraudulent statements or misrepresentations made in connection with the scheme to defraud is an essential element of bank fraud under § 1344. *United States v. Dillman*, 15 F.3d 384, 392 (5th Cir. 1994); *United States v.*

*Williams*, 12 F.3d 452, 546-57 (5th Cir. 1994); and *United States v. Heath*, 970 F.2d 1397, 1402-03 (5th Cir. 1992). The district court's failure to instruct the jury on "materiality" as requested by defendants was therefore erroneous under this Court's decision in *U.S. v. Gaudin, supra.*

In affirming petitioners' convictions under § 1344, the Fifth Circuit applied the "plain error" standard to the district court's failure to instruct the jury on the "materiality" of the fraudulent statements and/or misrepresentations. The Fifth Circuit based its erroneous application of this standard upon petitioners' failure to object to the district court's charge on these grounds. The Fifth Circuit's impression on this score was simply mistaken. Petitioners submitted proposed jury instructions to the district court. (App. 68). Included among them was a charge on the requirement of materiality under the offenses charged in the indictment, including specifically Counts 2 and 3 under § 1344. When the district court entertained objections on the record to its jury charge, counsel for Petitioners specifically referred to the proposed jury instructions submitted on behalf of Petitioners. The district court accepted counsel's in globo objection to her failure to give those instructions, and counsel for petitioners moved on to make objections to the charge as it was actually given. (App. 72). Any further objection would have been not only repetitive but obviously futile given the Fifth Circuit's pre-*Gaudin* position that "materiality" was an issue to be determined by the court.

Additionally, the Fifth Circuit's determination that its pre-*Wells* position on the materiality requirement of false statements in prosecutions brought under § 1344 is now

in doubt, making the district court's error in failing to charge the jury on materiality in connection with the bank fraud counts "unclear", 117 F.3d at p. 817, was ill-considered. The Ninth Circuit has revisited its pre-*Wells* position on the requirement of materiality of false statements made in connection with a § 1344 bank fraud and has found that requirement to survive this Court's decision in *Wells*.

> "Wells, however, leaves open the possibility of inferring a materiality requirement where it is a part of the settled common law meaning of the statutory language. ___ U.S. ___, 117 S.Ct. at 927. Unlike section 1014, which concerns 'false statements', section 1344 involves false 'pretenses, representations, or promises.' The term 'representation' has been held to include some notion of materiality at common law." (Citations omitted)

*United States v. Nash*, 115 F.3d 1431, 1436 (9th Cir. 1997). Similarly, the Tenth Circuit has addressed the post-*Wells* requirement of materiality in connection with mail and wire fraud cases and distinguished those statutes from § 1014 in *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997).

> "However, fraud has always required that misrepresentations or omissions be material to be actionable."

109 F.3d at ftn. #3, p. 668.

Under these circumstances, the Fifth Circuit's application of the "plain error" standard to the district court's failure to submit the issue of materiality to the jury on the bank fraud counts was such a departure from the

accepted and usual course of judicial proceedings as to justify an exercise of this Court's supervisory power.

**III. The opinion of the Fifth Circuit conflicts with the decision of the Second Circuit in *United States v. Seda*, respecting the Fifth Amendment's prohibition against double jeopardy and its application to multiple counts of bank fraud and false statements to a federally insured institution based upon the same factual allegations.**

Counts 2 and 4 of the indictment both arise out of the allegation that Petitioners Dupre and Sellers misrepresented the purchase price of the Upper Etiwanda property in connection with the $69 million loan from OTSB. Counts 3 and 6 of the indictment both arise out of the allegation that Dupre and Sellers misrepresented their purpose in seeking a release of collateral from OTSB.

In affirming the district court's refusal to dismiss as multiplicitous either Counts 2 and 3 or Counts 4 and 6 of the indictment, the Fifth Circuit ruled that multiple counts under §§ 1344 and 1014, arising out of what is admittedly the exact same conduct, were not multiplicitous under the standard outlined in this Court's decision in *Blockburger v. U.S.*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Fifth Circuit based this decision upon the lack of a "scheme or artifice" requirement of § 1014 and the lack of a requirement of a false statement to a federally insured financial institution under § 1344. 117 F.3d at p. 818 (App. 13-14). The Fifth Circuit in so doing ignored that the scheme or artifice which must be proven in charges brought under § 1344(2) (as were both Counts 2 and 3) is in fact one executed by means of false

statements to a federally insured financial institution. Additionally, it is hard to imagine the circumstances under which one might knowingly make false statements to a federally insured financial institution with the intention of influencing the institution's action on a loan which would not qualify as a scheme or artifice. The logic of the Fifth Circuit appears arbitrary and constrained.

Both the First and the Ninth Circuits have decided this issue in a manner which is in accord with the Fifth Circuit's decision in this case. While the First Circuit has arrived at the same result as the Fifth Circuit on this issue in *United States v. Fraza*, 106 F.3d 1050 (1st Cir. 1997), the reasoning of that decision has been subsequently undermined by this Court's decision in *United States v. Wells*, *supra*. The First Circuit based its decision upon the "element [contained in § 1014, which is] not contained in § 1344, that is, proof that the statements were 'materially false'." Since *Wells*, § 1014 does not require proof of materiality of the false statements. In *United States v. Nash*, *supra*, decided after this Court's decision in *Wells*, the Ninth Circuit based its decision that multiple counts under §§ 1014 and 1344 are not multiplicitous upon its determination that its pre-*Wells* position that false statements required to be proven under § 1344 must be material has survived the *Wells* decision and upon § 1014's requirement that the false statements be made in the context of a loan, while § 1344 false statements may be made in other contexts as well.

The opinion of the Second Circuit in *United States v. Seda*, 978 F.2d 779 (2nd Cir. 1992), is in direct conflict with the decisions of the First Circuit, the Ninth Circuit, and of the Fifth Circuit's decision herein. When faced with the

identical issue in *Seda*, the Second Circuit relied upon this Court's decision in *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and ruled that multiple counts under §§ 1014 and 1344 based upon the same factual allegations are multiplicitous and, as such, are in violation of the Fifth Amendment guarantee against double jeopardy. The Second Circuit therefore affirmed the district court's order that the government elect between the charges prior to trial.

The decision by the Second Circuit in *Seda* is the better reasoned approach. Not only is said opinion not subject to the same criticisms made of the Fifth and First Circuit opinions hereinabove, but the Second Circuit also relied heavily upon the legislative history of § 1344 to the effect that Congress intended to cover banking offenses that might not otherwise be covered under § 1014, for example check kiting schemes, rather than to make those guilty of an offense under § 1014 guilty of a second offense under § 1344.

This is an issue of obvious importance upon which there exists a split among the Circuits, and this Court should issue a writ herein and resolve said conflict.

**IV. In failing to address petitioners' appeal on the grounds of erroneous jury instructions and in failing to reverse petitioners' convictions on said grounds, the Fifth Circuit sanctioned the district court's departure from the accepted and usual course of judicial proceedings.**

In connection with its charge on Count 1, relating to the first object of the conspiracy as charged, namely the

payments made to John Ohanian totalling $155,000, and the requirement under § 215(a) that Mr. Ohanian be an "officer, director, employee, agent, or attorney of a financial institution", the district court gave the following definition of "agent":

> "An agent is a person authorized by another, the principal, to act for or in place of him, one entrusted with another's business, or a representative whose function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between principals and third persons." (App. 62)

Counsel for petitioners objected to this instruction as unnecessarily confusing and as permitting a conviction based upon a factual finding that Mr. Ohanian was at times "entrusted with the busniess" of OTSB, without being authorized to bind OTSB as is required for agency under traditional common law concepts. Instead, petitioners proposed an instruction based upon the Restatement (2d) as follows:

> "In order to be an agent, one must have discretionary authority on behalf of Oak Tree Savings Bank including the ability to alter the legal relations between the Oak Tree Savings Bank and LaJolla Pacific Equities, Inc. and Inland Pacific Real Estate, Inc. . . . An employee or agent is not someone who is merely connected in some capacity with a financial institution." (App. 70-71)

This was a particularly important distinction in this case, where Mr. Ohanian was clearly never an employee of OTSB. Notwithstanding the indictment's repeated description of Mr. Ohanian as an "employee **and** agent of Oak Tree Savings Bank" at Count 1(B)(a) and at 1(C)27

and (33), the government offered no evidence to this effect. Nor did Mr. Ohanian ever have any authority to bind OTSB to any loan commitments or to any terms or conditions thereon. Mr. Ohanian's sole connection to OTSB was as an employee of a wholly owned subsidiary of Landmark, which also owned OTSB.

The erroneous instruction given to the jury made possible the petitioners' conviction on a charge of conspiracy to violate 18 U.S.C. § 215(a)(1) on the basis of factual findings not tantamount to agency and therefore on the basis of conduct which Congress never intended to make criminal. In failing to address this issue duly raised in petitioners' appeal of their convictions, the Fifth Circuit sanctioned the district court's departure from the accepted and usual course of judicial proceedings. This action justifies the exercise of this Court's supervisory jurisdiction.

## V. CONCLUSION

The interpretations of the law respecting prosecutions brought under 18 U.S.C. §§ 1014 and 1344 are currently in flux. The Circuit Courts of Appeal are split on their approaches to the issues raised herein.

The way in which the issues raised herein are decided potentially affects every aspect of the prosecution against Petitioners and could potentially result in reversal of the convictions on every count. If any one of the three bases upon which the conspiracy count against petitioners was brought falls, then their conviction on Count 1 must be reversed, since there exists no way of determining upon which basis the jury rested its decision on Count 1. If petitioners' convictions on the substantive counts of bank fraud and false statement are reversed,

then the money laundering and forfeiture counts based thereon must also be reversed.

For all of these reasons, petitioners pray that the writ sought herein be granted.

Respectfully submitted,

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**UNITED STATES of America,**
**Plaintiff-Appellee-Cross-Appellant,**

**v.**

**Robert DUPRE and W. Harold Sellers,**
**Defendants-Appellants-Cross-Appellees.**

**No. 95-30275.**

United States Court of Appeals,
Fifth Circuit.

July 11, 1997.

Defendants were convicted in the United States District Court for the Eastern District of Louisiana, Ginger Berrigan, J., of conspiracy, bank fraud, making false statements to federally insured bank, and money laundering, related to loans received from bank in Louisiana to finance various real estate transactions in California. Defendants appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) even if materiality is element of bank fraud, unobjected-to failure to submit materiality issue to jury was not plain error; (2) counts charging bank fraud were not multiplicitous with counts charging making false statement to federally insured bank; (3) evidence supported convictions; (4) prosecution did not violate defendants' right to present witnesses; (5) remand was required for reconsideration of government's request for evidentiary hearing and for more specific findings on restitution; and (6) specific factual findings were required on issue of whether obstruction of justice enhancement under Sentencing Guidelines would be warranted.

Affirmed in part, vacated in part, and remanded.

Dennis, Circuit Judge, issued opinion concurring in part and dissenting in part.

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Appeals from the United States District Court for the Eastern District of Louisiana.

Before DAVIS and DENNIS, Circuit Judges, and FALLON,[1] District Judge.

W. EUGENE DAVIS, Circuit Judge:

W. Harold Sellers and Robert Dupre appeal their convictions on multiple counts related to loans received from the Oak Tree Savings Bank in New Orleans, Louisiana, to finance various real estate transactions in California. For the reasons that follow, we affirm their convictions on all counts and remand for fact-finding on two sentencing issues.

I.

In 1987, Dupre and Michael Barrack, both California businessmen, and Sellers, a Houston attorney, founded LaJolla Pacific Equities, Inc. (LPE), a California real estate operation. In 1988, LPE purchased four pieces of property from Braewood Development: Loma Linda, Sunrise Ranch, Lower Etiwanda, and Moreno Valley. Lomas Financial Corp. (Lomas), Braewood's parent company, financed the purchase. The deal included an interest

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[1] District Judge of the Eastern District of Louisiana, sitting by designation.

reserve that allowed LPE to defer interest payments for approximately a year.

In the fall of 1988, as the deadline for the interest reserve approached, Sellers and Dupre sought refinancing for the Lomas loans. John Ohanian, an employee of Landmark Land of California, Inc. (LOCAL), contacted Sellers and Dupre about buying the Moreno Valley and Sunrise Ranch properties. Sellers and Dupre refused to sell, but gave LOCAL an option on the two properties in return for refinancing the Lomas debt. Ohanian and his boss, Ernie Vossler, worked with LOCAL's parent company, the Oak Tree Savings Bank (OTSB), to arrange the refinancing. Vossler recommended to the OTSB board that the bank provide a $69 million loan to LPE. This sum included $55.8 million to refinance the Lomas debt on all four properties, payment for various fees and taxes, and $4.2 million to allow LPE to purchase another property called Upper Etiwanda.

Sellers and Dupre told OTSB officials that Upper Etiwanda, a property adjacent to Lower Etiwanda, was priced at $6.2 million, and they requested $4.2 million to pay off the property. Dupre and Sellers did not reveal to the bank that Minter Interests, Inc., a company that Sellers created under an assumed name, already owned Upper Etiwanda. Appellants' corporation, Minter Interests, had purchased Upper Etiwanda for roughly $1.6 million; it "sold" the property to appellants for $6.2 million.

Meanwhile, Sellers, Dupre, and Barrack negotiated a loan discount from Lomas on their original debt by claiming inability to pay and threatening to sue for usury.

Lomas agreed to a $3 million reduction on its $55.8 million loan. At the December 21, 1988, closing, appellants denied to Ohanian that they had received a discount on the Lomas debt. Shortly after OTSB distributed the full amount of the loan – $55.8 million – to Lomas, Lomas wired the $3 million loan discount to Sellers. Sellers and Dupre wired proceeds from both the loan discount and the sale of Upper Etiwanda to domestic accounts and accounts in the Cayman Islands.

Barrack testified for the government that as Sellers and Dupre left the OTSB loan closing, Dupre told him he had "taken care of" Ohanian, the LOCAL representative. Ohanian admitted accepting $75,000 from Dupre and pleaded guilty to the felony of accepting a gift to procure a loan, in violation of 18 U.S.C. § 215. Dupre and Sellers claim that Vossler arranged a "bonus" for Ohanian to be paid directly by Sellers and Dupre to avoid making other employees jealous. Vossler denied this in his testimony.

LOCAL purchased both Etiwanda properties in March 1989. OTSB required that $3.8 million from the sales be placed in a certificate of deposit (CD) for collateral on the loan for the Loma Linda property. In 1989, Sellers and Dupre obtained permission from OTSB to withdraw $1.5 million from the CD to buy four new properties that would serve as collateral for the loan. Dupre and Sellers, operating under Inland Pacific Real Estate, Inc., immediately used some of the funds for overhead and costs. They never purchased the properties.

The jury convicted Sellers and Dupre on one count of conspiracy, in violation of 18 U.S.C. § 371 (count 1); two counts of bank fraud, in violation of 18 U.S.C. § 1344

(counts 2 and 3); two counts of making false statements to a federally insured bank, in violation of 18 U.S.C. § 1014 (counts 4 and 6); and eight counts of money laundering, in violation of 18 U.S.C. § 1957. (counts 7-15). In a bifurcated proceeding, the jury returned a special forfeiture verdict of $7,070,463, representing the proceeds of money laundering, against both Sellers and Dupre. Sellers received concurrent sentences of 60 months for counts 1 and 2, 76 months for each of counts 3, 6, and 7-15, and 24 months for count 4, requiring him to serve a total of 76 months. He was ordered to pay $2,000,000 in restitution. Dupre received concurrent sentences of 60 months for counts 1 and 2, 70 months for each of counts 3, 6, and 7-15, and 24 months on count 4, requiring him to serve a total of 70 months. He was ordered to pay $500,000 in restitution.[2]

The defendants timely appealed. We consider below appellants' challenges to their convictions.

## II.

Sellers and Dupre first challenge the district court's instructions to the jury. Specifically, they argue that the materiality of their allegedly fraudulent statements was an essential element of the bank fraud and false statement offenses, and, therefore, that the district court erred in failing to submit materiality to the jury. The district court followed the law of this circuit at the time of trial

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[2] Michael Barrack, who was also charged in the indictment, pleaded guilty to one count charging conspiracy to make false statements to a federally insured bank.

and decided the issue of materiality as a matter of law. However, in June 1995, the Supreme Court overruled the position held by this court and most other federal circuits and concluded that when materiality is an element of the charged offense, it presents a mixed issue of law and fact to be decided by a jury. *United States v. Gaudin*, 515 U.S. 506, ___-___, 115 S.Ct. 2310, 2314-15, 132 L.Ed.2d 444 (1995). The appellants argue that the trial court's failure to submit the question of materiality to the jury violates their constitutional rights and requires reversal of their convictions on counts 2, 3, 4, and 6.[3]

A.

Counts 2 and 3 charge appellants with bank fraud under 18 U.S.C. § 1344. The counts arise from appellants' misrepresentations about the purchase price of Upper Etiwanda and the loan discount (count 2) as well as the intended use of $1.5 million in released collateral (count 3). A violation of § 1344 is established when the government demonstrates that the defendant knowingly executed or attempted to execute a scheme or artifice (1) to defraud a financial institution or (2) to obtain any property owned by, or under the custody or control of, a financial institution, through false or fraudulent pretenses, representations, or promises. 18 U.S.C. § 1344. On its face, the text of the statute does not require that false

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[3] A panel of this court released Sellers and Dupre pending appeal after the Supreme Court rendered its decision in *Gaudin*.

statements integral to § 1344 be material.[4] Nevertheless, many circuits, including this one, have required a showing of materiality. *See, e.g., United States v. Goldsmith,* 109 F.3d 714, 715 (11th Cir.1997); *United States v. Campbell,* 64 F.3d 967, 975 (5th Cir.1995); *United States v. Smith,* 46 F.3d 1223, 1236 (1st Cir.), *cert. denied,* ___ U.S. ___, 116 S.Ct. 176, 133 L.Ed.2d 116 (1995); *United States v. Hutchison,* 22 F.3d 846, 851 (9th Cir.1993); *United States v. Davis,* 989 F.2d 244, 247 (7th Cir.1993); *United States v. Hollis,* 971 F.2d 1441, 1452 (10th Cir.1992), *cert. denied,* 507 U.S. 985, 113 S.Ct. 1580, 123 L.Ed.2d 148 (1993); *United States v. Sayan,* 968 F.2d 55, 61 n. 7 (D.C.Cir.1992); *United States v. Goldblatt,* 813 F.2d 619, 624 (3d Cir.1987). A recent Supreme Court decision casts doubt on this determination. In *U.S. v. Wells,* ___ U.S. ___, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997), the Court considered whether 18 U.S.C. § 1014 – which prohibits the making of a false statement to a federally insured bank – contains a materiality requirement when the statute itself does not mention materiality. It concluded, contrary to most circuit courts, that materiality

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[4] In full, § 1344 provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
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> (1) to defraud a financial institution; or
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> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344.

was not an element of the offense under a plain reading of the text and that statutory history confirmed that reading. *Id.* at ___-___, 117 S.Ct. at 927-28.

Since *Wells*, we have not revisited whether materiality is an element of a § 1344 offense, which, like § 1014, does not contain an express materiality requirement. However, we conclude that appellants' convictions will stand even if materiality is an element of a § 1344 offense and the jury instructions were erroneous. Therefore, we need not determine here whether our previous holding that materiality is an essential element of a § 1344 offense survives *Wells*.

Although appellants objected to the court's treatment of materiality with respect to the § 1014 false statement counts, they did not object to the district court's failure to submit materiality to the jury on the § 1344 bank fraud counts. Sellers' attorney stated:

> As to the false statements on page 23 [the page of the court's jury instructions on the § 1014 counts], we object to the failure to instruct the jury on materiality. . . . It's the position of the defendants that the failure to charge on that issue is vital [to] the defendants' right to a jury trial in that element to that offense.

This makes no reference to counts 2 and 3, the § 1344 counts, and, in fact, specifically limits the objection to the false statement counts.[5]

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[5] Sellers' attorney did object to the instructions as to the § 1344 counts. However, the objection went to the intent necessary to support a conviction on those counts and had no relation to the materiality issue.

The only indication that the appellants wanted the court to send materiality to the jury on the § 1344 counts is their proposed jury instructions, which read:

> In order to find Mr. Sellers and Mr. Dupre guilty of . . . committing bank fraud . . . , the government must prove beyond a reasonable doubt that the statements and/or the false or fraudulent pretenses were material. A statement is material if it is capable of influencing the decision of the financial institution. The appropriate question to ask is, "if the bank had relied on the defendant's statements, would it have made any difference?["]

However, under Rule 30 of the Federal Rules of Criminal Procedure, these proposed instructions do not preserve error on appeal, absent an objection specific to the counts at issue.[6] *See United States v. Hoelscher*, 914 F.2d 1527, 1534 (8th Cir.1990), *cert. denied*, 500 U.S. 943, 111 S.Ct. 2240, 114 L.Ed.2d 482 (1991); *United States v. Beverly*, 913 F.2d 337, 357 (7th Cir.1990), *cert. denied*, 498 U.S. 1052, 111 S.Ct. 766,

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[6] Rule 30 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. . . . *No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict*, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Fed.R.Crim.P. 30 (emphasis added).

112 L.Ed.2d 786 (1991); *United States v. Friedman*, 854 F.2d 535, 555 (2d Cir.1988), *cert. denied*. 490 U.S. 1004, 109 S.Ct. 1637, 104 L.Ed.2d 153 (1989); *cf. McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 306 (5th Cir.1993) (concluding that, under Fed.R.Civ.P. 51, the civil counterpart to Fed.R.Crim.P. 30, "a pretrial request for instructions or interrogatories is ordinarily insufficient to preserve error"). Because appellants failed to object to the denial of the requested materiality instruction with regard to the § 1344 counts, we review the *Gaudin*-error claim for plain error under Rule 52(b) of the Federal Rules of Criminal Procedure. *Johnson v. United States*, ___ U.S. ___, ___-___, 117 S.Ct. 1544, 1548-49, 137 L.Ed.2d 718 (1997); *United States v. Jobe*, 101 F.3d 1046, 1061-62 (5th Cir.1996). In doing so, we are guided by the plain-error analysis outlined in *United States v. Olano*, 507 U.S. 725, 730-36, 113 S.Ct. 1770, 1775-79, 123 L.Ed.2d 508 (1993), and reiterated in the context of *Gaudin* error in *Johnson v. United States*.[7] Under the *Olano* analysis, this court may reverse only if: (1) there was error (2) that was clear and obvious and (3) that affected a defendant's substantial rights. *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir.1994) (*en banc*) (citing *Olano*, 507 U.S. at 730-36, 113 S.Ct. at 1775-79), *cert. denied*, 513 U.S. 1196, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995). When these elements of plain error

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[7] In *Johnson*, a defendant convicted of perjury contended that the court committed reversible error because it failed to submit materiality – an express element of perjury under 18 U.S.C. § 1623 – to the jury. The court held that the claimed *Gaudin* error was not the type of "plain error" that a court may notice under Rule 52(b). *Johnson*, ___ U.S. at __, 117 S.Ct. at 1547.

are present, a court may exercise its discretion to correct the error if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 164 (quoting *Olano*, 507 U.S. at 732, 113 S.Ct. at 1776-77).

For our purposes, we assume that under *Gaudin*, the court's failure to submit materiality to the jury was error, and, therefore, the first prong of *Olano* is met. The second prong – the plainness of the error – requires greater analysis. The Supreme Court in *Johnson* resolved confusion among the circuits and, indeed, within this one,[8] when it held that in cases "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal – it is enough that an error be 'plain' at the time of appellate consideration." *Johnson*, ___ U.S. at ___, 117 S.Ct. at 1549. Thus, in reviewing the district court's jury instructions for plain error, we look to the law – all of the law – as it now exists on appeal. After *Gaudin*, we assume that the district court erred in failing to submit materiality – long considered an element of § 1344 – to the jury. However, in light of *Wells*, the plainness of that error is suspect. As we noted in *Calverley*, " 'plain' errors are errors which are 'obvious,' 'clear,' or 'readily apparent;' they are errors which are so conspicuous that 'the trial judge and prosecutor were derelict in countenancing [them], even absent the defendant's timely assistance in detecting [them].' " *Calverley*, 37 F.3d at 163 (citations omitted). *Wells* 'rejection of materiality as an element of a

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[8] *Compare Calverley*, 37 F.3d at 162-63 (requiring that plain error be " 'clear under current law' at the time of trial") *with Jobe*, 101 F.3d at 1062 (holding that plain error is measured at time of appeal).

§ 1014 offense casts doubt on this circuit's holding that materiality is an element of § 1344 violations and, therefore, renders the claimed error unclear.

The decisions in *Gaudin* and *Wells* have prompted this court and others to revisit implied materiality requirements in various statutes. For example, in *United States v. Harvard*, 103 F.3d 412, 418 (5th Cir.1997), we concluded that materiality is not an element of 18 U.S.C. § 1005. Likewise, the Eleventh Circuit held that *Wells* operated to overrule its decisions requiring materiality for § 1010 violations. *United States v. De Castro*, 113 F.3d 176 (11th Cir.1997); *see also United States v. Upton*, 91 F.3d 677, 685 (5th Cir.1996) (holding that materiality is not an element of § 287 offense), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1818, ___ L.Ed.2d ___ (1997). *But see United States v. Shunk*, 113 F.3d 31, 34 (5th Cir.1997) (declining to reexamine whether materiality is element of § 1006 offense). As these cases demonstrate, whether materiality is properly considered an element of § 1344 after *Wells*, when it is not expressly required by statute, is unsettled. Any error committed by the court in withholding materiality from the jury was therefore not plain or obvious. Because the court's error is not obvious after *Wells*, we cannot say that the district court committed plain error in failing to submit materiality to the jury on the § 1344 counts.

B.

Appellants argue next that the district court erred in failing to submit materiality to the jury on the § 1014 counts. Counts 4 and 6 charged appellants with making a

false statement to OTSB, a federally insured financial institution, to influence the actions of the bank. The false statements at issue relate to the purchase price of Upper Etiwanda (count 4) and the intended use of $1.5 million in released collateral (count 6). To obtain a conviction on a § 1014 offense, this circuit has previously required the government to show that the false statements were material. *See United States v. Thompson*, 811 F.2d 841, 844 (5th Cir.1987). However, as noted, this position has been squarely rejected by the Supreme Court in *Wells*, ___ U.S. at ___-___, 117 S.Ct. at 926-28. Because § 1014 does not require that the false statement at issue be material, the district court did not err in failing to submit materiality to the jury on these counts.

III.

Appellants next contend that counts 2 and 3, charging bank fraud, are multiplicious with counts 4 and 6, charging the making of false statements, and that these duplicitous charges subjected them to double jeopardy. Count 2 charges bank fraud in connection with appellants' misrepresentations about the price and ownership of Upper Etiwanda. Similarly, count 4 charges appellants with making a false statement for the same misrepresentations. Counts 3 and 6 charge bank fraud and false statements, stemming from appellants' false representations in connection with the withdrawal of $1.5 million in released collateral.

We review issues of multiplicity *de novo*. *United States v. Hord*, 6 F.3d 276, 280 (5th Cir.1993), *cert. denied*, 511 U.S. 1036, 114 S.Ct. 1551, 128 L.Ed.2d 200 (1994). In cases

where a single act supports convictions under different criminal statutes, double jeopardy concerns are not implicated when "each provision requires proof of a fact which the other does not." *United States v. Galvan*, 949 F.2d 777, 781-82 (5th Cir.1991); *see Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).

Our decision in *United States v. Henderson*, 19 F.3d 917 (5th Cir.), *cert. denied*, 513 U.S. 877, 115 S.Ct. 207, 130 L.Ed.2d 137 (1994), is factually indistinguishable from this case and controls our decision here. In *Henderson*, the defendant was convicted for multiple counts related to fraudulent banking activities. *Id.* at 919. On appeal, he contended that counts charging bank fraud in violation of § 1344 and making false statements to a federally insured bank in violation of § 1014 were multiplicious because they involved identical conduct related to one loan. *Id.* at 925-26. After comparing the two provisions, we rejected Henderson's contention. *Id.* at 926.

As we explained in *Henderson*, bank fraud under § 1344 requires proof of a "scheme or artifice" to defraud or to obtain property from a federally insured financial institution. *Id.*; 18 U.S.C. § 1344. "There is no 'scheme or artifice' requirement in section 1014. Further, there is no requirement that the person charged with bank fraud make a . . . false statement to an insured bank." *Henderson*, 19 F.3d at 926. Because each statute requires proof of an additional fact, the bank fraud and false statement counts are not multiplicious. *See United States v. Fraza*, 106 F.3d 1050, 1053 (1st Cir.1997) (recognizing that "on the plain language of these statutes, the requirements of *Blockburger* are satisfied"); *United States v. Wolfswinkel*, 44 F.3d 782, 785 (9th Cir.1995) (concluding that bank fraud

and misapplication of bank funds do not constitute same offense). *But see United States v. Seda*, 978 F.2d 779, 782 (2d Cir.1992) (holding that §§ 1014 and 1344 are multiplicious when they arise from the same offense). We therefore reject appellants' multiplicity and double jeopardy arguments.

IV.

Sellers and Dupre raise several objections to the sufficiency of the evidence supporting their convictions on the counts discussed below. The evidence is sufficient to support a guilty verdict if a rational jury could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Salazar*, 958 F.2d 1285, 1290-91 (5th Cir.), *cert. denied*, 506 U.S. 863, 113 S.Ct. 185, 121 L.Ed.2d 129 (1992).

A.

Counts 2 and 4 charge Sellers and Dupre with bank fraud and making false statements in connection with their misrepresentations about the purchase price of Upper Etiwanda. Sellers and Dupre argue that the evidence is insufficient to establish beyond a reasonable doubt that they knowingly committed bank fraud and made false statements in connection with the loan for the property.

The record reveals that appellants' communications with the bank about Upper Etiwanda were riddled with misrepresentations. The government produced evidence

that Sellers and Dupre, acting as Minter Interests, exercised an option to buy Upper Etiwanda from Etiwanda Highland Property, Ltd., for approximately $1.6 million on December 14, 1988. Sellers and Dupre submitted an earnest money contract to the bank showing that Minter Interests was selling Upper Etiwanda for roughly $6.2 million. The contract was purportedly signed by Minter's vice president, a California attorney named Joe Kennedy. Kennedy testified that he had not seen or signed the document and that he had nothing to do with Minter Interests. On December 21, a week after Minter Interests purchased the property, the two appellants borrowed $4.2 million from OTSB to buy Upper Etiwanda from Minter Interests.[9]

Sellers and Dupre never disclosed to OTSB their interest in Minter or the amount actually necessary to buy Upper Etiwanda in an arms-length transaction. *See, e.g., United States v. Trice*, 823 F.2d 80, 86 (5th Cir.1987) (noting that § 1014 may be violated by "the failure to disclose material information needed to avoid deception in connection with a loan transaction"). Nor did appellants use the loan money to buy the property. According to exhibits and Sellers' testimony, most of the funds were wired to domestic accounts and accounts in the Cayman Islands. Based on the evidence in the record, the jury was entitled to infer that the true facts underlying appellants' purchase of the property – including their interest in Minter and the amount actually necessary to buy it in an arms-length transaction – were material to the lender. The

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[9] Bank officials testified that they believed appellants had made a $2 million down payment on the property.

record supports the conclusion that appellants orchestrated a scheme to obtain funds from OTSB, in part, by knowingly misrepresenting the price of Upper Etiwanda.

Count 2 also charges Sellers and Dupre with bank fraud in connection with the $3 million discount that LPE negotiated with Lomas and that appellants concealed from OTSB. Appellants represented to OTSB that they needed to refinance a $55.8 million loan from Lomas. However, Lomas officials testified that, beginning in the first week of December 1988, appellants sought a discount on the loan. By mid-December, Lomas had agreed to give appellants and Barrack a $3 million loan discount, thereby reducing the total loan amount to $52.8 million. Ohanian testified that he asked appellants at the OTSB loan closing on December 21, 1988, whether they had received a discount and Dupre reportedly stated, "we didn't get that work[ed] out." Numerous OTSB officials testified that they would have reduced the OTSB loan by $3 million had they known of the discount. Viewing this evidence in the light most favorable to the government, the jury was entitled to infer that appellants misrepresented the balance owed on the loan OTSB agreed to refinance.

Counts 3 and 6 charge Sellers and Dupre with bank fraud and making false statements in connection with their withdrawal of $1.5 million from the $3.8 million CD pledged as collateral for the OTSB loan. Appellants obtained permission to withdraw the funds in August 1989 allegedly to buy additional property. The government produced correspondence from OTSB to Sellers and Dupre showing that OTSB agreed to the withdrawal on the condition that Sellers and Dupre "use the Funds to

provide downpayments on . . . parcels of property in southern California," advise OTSB of the status of the proposed purchases, and allow OTSB, by contract, to receive 50% of subsequent sales of each of the properties to pay the balance of the loan. OTSB required that LPE's board of directors authorize the withdrawal of funds, and LPE provided a corporate resolution representing that Sellers, Dupre, and Barrack approved the withdrawal. Barrack testified that he did not approve the withdrawal and, in fact, had no knowledge of the scheme to obtain funds. The evidence showed that $1.5 million was released to LPE, and $810,000 was immediately transferred to Inland Pacific, a corporation owned by Sellers and Dupre that did not involve Barrack; the funds were spent on Inland Pacific operating costs. The record shows that no funds were used to purchase property.

Based on this evidence, a reasonable jury was entitled to conclude that appellants made false representations regarding the use of the $1.5 million to induce the bank to approve the withdrawal.

B.

Next, Sellers and Dupre contend that the evidence is insufficient to support their convictions for conspiracy under count 1. To establish a conspiracy violation under 18 U.S.C. § 371, the government must establish: (1) an agreement between two or more people, (2) to commit a crime against the United States, and (3) an overt act by one of the conspirators to further the objectives of the conspiracy. *United States v. Krenning*, 93 F.3d 1257, 1262 (5th Cir.1996). Count 1 charges conspiracy to commit the

various crimes in counts 2-4 and 6 and conspiracy to unlawfully give money to an agent of the bank in violation of 18 U.S.C. § 215(a). As outlined above, the evidence demonstrates that Sellers and Dupre jointly participated in the activities underlying counts 2-4 and 6. This evidence of cooperative effort is sufficient to support appellants' convictions for conspiracy to commit bank fraud and make false statements. We turn to the sufficiency of the evidence to support the conspiracy to give money to an agent of a bank.

Section 215(a)(1) provides:

> (a) Whoever –
>
> > (1) corruptly gives, offers, or promises anything of value to any person, with intent to influence or reward an officer, director, employee, agent, or attorney of a financial institution in connection with any business or transaction of such institution;
> >
> > . . . .
>
> shall be fined . . . or imprisoned . . . or both.

18 U.S.C. § 215.

Sellers and Dupre argue that the evidence was insufficient to demonstrate that John Ohanian, an employee of LOCAL, an OTSB subsidiary, acted as an agent or employee of OTSB or that Sellers and Dupre corruptly rewarded him for providing them with a loan. The government's evidence showed that Ohanian collected loan documentation for OTSB, including financial statements and corporate documents, assisted in negotiations, and was present at the loan closing. Sellers and Dupre used Ohanian as their contact with the bank, and Sellers stated

in deposition testimony that Ohanian was an agent of the bank. This evidence demonstrates that Ohanian acted on the bank's behalf, under its control, and with its consent. *See* Restatement (Second) of Agency § 1. Viewing this evidence in the light most favorable to the government, a rational jury could conclude beyond a reason able doubt that Ohanian was an agent of OTSB.

The government also produced evidence that Dupre paid Ohanian $75,000 in connection with the refinancing of the Lomas loan by OTSB. Ohanian testified that he and Dupre met at Dupre's country club a day or two after the loan closed and that Dupre gave him a personal check for $75,000. Barrack testified that Dupre told him he was "going to take care of" Ohanian by giving him a personal check that would not appear on LPE books. Ohanian later pleaded guilty to accepting a bribe under 18 U.S.C. § 215(a)(2).[10] Based on this evidence, a jury was entitled to conclude that Sellers and Dupre agreed to reward Ohanian for obtaining the loan in violation of § 215(a)(1).

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[10] Under 18 U.S.C. § 215(a)(2):

(a) Whoever –

. . .

> (2) as an officer, director, employee, agent, or attorney of a financial institution, corruptly solicits or demands for the benefit of any person, or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution;

shall be fined . . . or imprisoned . . . or both.

C.

Dupre and Sellers also challenge the sufficiency of the evidence supporting their conviction on several of the money laundering counts. They further contend that their convictions on all of the money laundering counts must be reversed because they fail to charge an offense.

Counts 7-12 allege that Sellers and Dupre violated 18 U.S.C. § 1957 when they transferred $4.2 million obtained from the "sale" of Upper Etiwanda from Minter Interests to LPE to personal bank accounts in the Cayman Islands and elsewhere. To support a conviction under § 1957, the government must prove that the defendant "knowingly engage[d] or attempt[ed] to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity." 18 U.S.C. § 1957(a). "Criminally derived property" is "any property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. § 1957(f)(2).

Sellers and Dupre argue, without support, that because the Upper Etiwanda property had some value, the entire $4.2 million did not constitute criminally derived property under the money laundering statute. We disagree. The evidence, outlined above, was sufficient to support appellants' convictions for bank fraud charged in count 2. Based on that evidence, the jury was entitled to conclude that the proceeds of the loan – $4.2 million – was derived as a result of appellants' unlawful scheme to obtain a loan from OTSB through misrepresentation. Therefore, appellants' convictions on these counts will stand.

Sellers and Dupre also argue that the district court erred in refusing to dismiss all of the money laundering

counts (counts 7-15) – involving roughly $7,000,000 – on the ground that they failed to charge an offense under § 1957. In each of the transactions underlying these counts, portions of proceeds from the $69 million loan and the loan discount in Sellers' Century Land Title account were wired to accounts in the Cayman Islands and to appellants' domestic accounts. To establish a violation of § 1957, the government was required to prove that the funds at issue were derived from a criminal offense when the appellants transferred them. *United States v. Leahy*, 82 F.3d 624, 635 (5th Cir.1996). Appellants argue that, as alleged in the indictment, the underlying bank fraud counts were not completed until the money was transferred to the Cayman Island and domestic accounts. Thus, according to appellants, at the time of the transfer the funds were not criminally derived – that is, the proceeds of a crime.[11] *See United States v. Johnson*, 971 F.2d 562, 569 (10th Cir.1992).

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[11] According to count 2, appellants:

> did knowingly devise and intend to devise a scheme and artifice to defraud Oak Tree Savings Bank and obtain money and funds owned by and in the custody and control of Oak Tree Savings Bank by means of false and fraudulent pretenses, representations and promises by applying for and receiving a loan in the approximate amount of $69,000,000, to be used for the purposes set forth in the loan documentations submitted to Oak Tree Savings Bank when in truth and in fact, [appellants] concealed from Oak Tree Savings Bank that portions of the proceeds of the $69,000,000 loan would be diverted to their personal benefit and would not be utilized for the purpose and in the manner set forth in the loan documentation.

Appellants read the language in count 2 too broadly. The bank fraud charged in count 2 was complete when Lomas and OTSB, through Chicago Land Title Company, transferred the funds in question to Sellers' account in Houston, Texas. The crime was complete and the funds became "criminally derived property" when they came under Sellers' control. *See United States v. Allen*, 76 F.3d 1348, 1360 (5th Cir.) ("[T]he funds at issue in each of the transactions became proceeds at the moment the money left the control of [the bank] and was deposited into an account of a consultant or borrower."), *cert. denied*, ___ U.S. ___, 117 S.Ct. 121, 136 L.Ed.2d 71 (1996). Therefore, counts 7-15, which stemmed from the subsequent wire transfers of funds to appellants' accounts in Cayman Islands and throughout the United States, properly charged money laundering for purposes of § 1957.

D.

In their final sufficiency attack, Sellers and Dupre argue that the evidence does not establish venue as to all counts because none of the offenses in the indictment were committed in the Eastern District of Louisiana.

The government must prove venue by a preponderance of the evidence. *Leahy*, 82 F.3d at 632. By statute, venue for continuing offenses will lie "in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). Bank fraud, false statement, and money laundering offenses are "continuing" offenses for purposes of § 3237. *See United States v. Hubbard*, 889 F.2d 277, 280 (D.C.Cir.1989); *Leahy*, 82 F.3d at 633; *United States v. Beddow*, 957 F.2d 1330, 1335 (6th Cir.1992). Counts 2 and 4 charge appellants with bank fraud and false statement

offenses in connection with the initial $69 million loan from OTSB, located in the Eastern District of Louisiana. Counts 3 and 6, also charging bank fraud and false statement offenses, relate to appellants' withdrawal of $1.5 million from a CD pledged on the loan. Counts 7-15 charge money laundering using funds derived from the bank fraud.

Sellers and Dupre argue that venue was improper as to all of these counts because the government failed to show that they knew OTSB was disbursing proceeds of the $69 million loan. They contend that they entered into a loan agreement with Oak Tree Mortgage Corporation (OTMC), an Oklahoma corporation that is not a federally insured institution and that is authorized to do business in California. According to appellants, OTMC subsequently assigned the loan to, and obtained funding from, OTSB, a federally insured institution.[12]

Appellants' contention is belied by the record. Among other documents, the government produced: (1) a loan application, dated December 20, 1988, and signed by Sellers, which contained a warning that "knowingly mak[ing] any false statements" in the application constituted a § 1014 violation – a warning only required where the lender is federally insured; (2) a commitment letter dated December 8, 1988, from John Taylor, an OTSB official, on OTSB letterhead, which identified the lender as OTSB, was signed by Dupre, and returned to OTSB; (3) a financing statement, dated December 21, 1988, and signed by Sellers, on which OTSB is designated as the secured

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[12] OTMC and OTSB are both subsidiaries of Landmark Land Company, Inc.

party; and (4) a check, dated December 9, 1988, written on LPE's account to OTSB for $50,000, the amount stipulated in the commitment letter. Additionally, both Sellers and Dupre testified that they had extensive experience with real-estate investment transactions. Dupre had worked in real-estate acquisitions since the early 1970s; Sellers had practiced real-estate law for more than 25 years. *See United States v. Allen*, 76 F.3d 1348 (5th Cir.1996) (holding that evidence showing that defendants were financially sophisticated and had received documents referring to bank was sufficient to establish that they knew they were defrauding bank).

The government's documentary evidence, when considered in light of appellants' business and legal background, is more than adequate to establish by a preponderance of the evidence that venue was proper in the Eastern District of Louisiana.

V.

Finally, Sellers and Dupre allege prosecutorial misconduct in connection with the government's remarks about a prospective defense witness.[13] Near the end of the trial, appellants planned to call Kenneth Pickering, a former Louisiana Banking Commissioner, to testify on banking practices and regulations. They contend that Pickering would have testified that fees are commonly paid to loan brokers, such as Ohanian, and that OTMC

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[13] Appellants also challenge the district court's admission of various pieces of evidence; its instructions relating to willful blindness; and its refusal to depart downward in its sentencing. After a review of the record, we conclude that these contentions are meritless and unworthy of greater discussion.

and OTSB were legally distinct entities. The government told the district court that Pickering was under federal investigation in two unrelated matters and that the information might be relevant for impeachment purposes on cross-examination. After inquiring *in camera* as to the government's basis for cross-examination, the court, in turn, informed Pickering that he might face questioning on the issue. Pickering later declined to testify as a banking expert. Dupre and Sellers moved for a mistrial on the grounds of prosecutorial misconduct or, in the alternative, a recess to find a new banking expert. Their motions were denied.

We review the denial of a motion for mistrial for abuse of discretion. *See United States v. Bentley-Smith*, 2 F.3d 1368, 1378 (5th Cir.1993). Under the Sixth Amendment, a criminal defendant has the right to present witnesses to establish his defense without fear of retaliation against the witness by the government. *Webb v. Texas*, 409 U.S. 95, 98, 93 S.Ct. 351, 353-54, 34 L.Ed.2d 330 (1972). "[S]ubstantial governmental interference with a defense witness' choice to testify may violate the due process rights of the defendant." *United States v. Whittington*, 783 F.2d 1210, 1219 (5th Cir.), *cert. denied*, 479 U.S. 882, 107 S.Ct. 269, 93 L.Ed.2d 246 (1986); *see, e.g., United States v. Hammond*, 598 F.2d 1008, 1012 (5th Cir.1979) (reversing because FBI agent told defense witness that he would have "nothing but trouble" in pending state prosecution if he persisted in testifying); *United States v. Henricksen*, 564 F.2d 197, 198 (5th Cir.1977) (reversing where government threatened to void plea bargain if potential witness testified); *United States v. Smith*, 478 F.2d 976, 979 (D.C.Cir.1973) (reversing where government threatened

to prosecute witness if he testified in pending trial). However, no due process violation exists "so long as the investigation of witnesses is not prompted by the possibility of the witnesses testifying, and so long as the government does not harass or threaten them." *Whittington*, 783 F.2d at 1219-20; *see United States v. Fricke*, 684 F.2d 1126, 1130 (5th Cir.1982) (finding no due process violation when prosecution told witnesses, during trial, that they were subjects of grand jury investigation), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1250, 75 L.Ed.2d 480 (1983).

The record here does not support appellants' charges of prosecutorial intimidation. The government's investigation of Pickering was completely unrelated to his prospective testimony. The district court was entitled to conclude that the government sought neither to threaten or harass and that the prosecutor's remarks to the court were made to advise it of potential lines of cross-examination. The court's denial of Sellers and Dupre's motion for mistrial for purported prosecutorial misconduct was not an abuse of discretion.

Likewise, the district court did not abuse its discretion in refusing to grant a continuance. The denial of a defendant's motion for continuance will be reversed only when the district court abused its discretion and the defendant suffered serious prejudice. *United States v. Scott*, 48 F.3d 1389, 1393 (5th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 264, 133 L.Ed.2d 187 (1995). To obtain a continuance on the grounds of unavailability of a witness, the movant must show (1) that due diligence was exercised to obtain the attendance of the witness; (2) that the witness would tender substantial favorable evidence; (3) that a witness was available and willing to testify; and (4)

that the denial of a continuance would materially prejudice the defendant. *Id.* at 1394 (upholding denial of continuance where defendant failed to demonstrate due diligence in obtaining expert witness or that testimony would be favorable). Here, the court concluded that Pickering's testimony was cumulative in light of the testimony of another defense witness, a former OTSB employee who testified as to the relationship between OTSB and its subsidiaries. The court's denial of a continuance, in light of this finding, was not an abuse of discretion.

VI.

The government cross-appeals the district court's restitution order and its ruling on a proposed obstruction of justice enhancement under the sentencing guidelines with regard to Sellers. The government raised serious questions about whether Sellers had concealed assets from the district court through a variety of financial transactions and sought to present evidence to that effect. The district court refused to consider the evidence, concluding that:

> to attempt to get into an investigation, an analysis of whether Mr. Sellers has assets that he failed to report and whether the amount of those assets that he failed to report would or would not affect a restitution order would, I feel, unduly complicate and prolong the sentencing process. For the record, it has been, I think, seven or eight months since the trial has been completed and a number of delays in sentencing and we need to go forward with that.

After noting that the Resolution Trust Corporation could pursue civil litigation to discover and recover additional funds on behalf of the bank, the court declined to determine the total amount of restitution possible and ordered Sellers to pay partial restitution of $2,000,000.[14]

The district court acted pursuant to the restitution provisions of the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. §§ 3663-3664. Under § 3663(a), a court may decline to order restitution "[t]o the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims." 18 U.S.C. 3663(a)(1)(B)(ii); *see also* U.S.S.G. § 5E1.1(b). Yet, the VWPA also requires a court to consider defendant's ability to pay. 18 U.S.C. § 3663(a)(1)(B)(i)(II). The government argues that the restitution order is erroneous because the "complication and prolongation" exemption provision does not allow a court to avoid considering a defendant's financial resources; such a reading, it contends, would privilege sophisticated defendants who are able to hide their assets from the court.

The language of the exemption provision gives the district court a certain amount of discretion in determining whether to consider additional evidence in assessing restitution. However, thus far, courts have exercised that discretion infrequently and only when considering difficult issues of causation or speculative loss. *See, e.g.,*

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[14] The outstanding balanced owed to OTSB was approximately $36 million.

*United States v. Fountain*, 768 F.2d 790, 802 (7th Cir.1985) ("[P]rojecting lost future earnings has no place in criminal sentencing if the amount or present value of those earnings is in dispute."), *cert. denied*, 475 U.S. 1124, 106 S.Ct. 1647, 90 L.Ed.2d 191 (1986); *United States v. Bengimina*, 699 F.Supp. 214, 218-19 (W.D.Mo.1988) (refusing to allow "excessive satellite litigation" to evaluate worth of bankrupt corporation because of complicated issues of proof). Legislative history suggests that § 3663(a) is directed at avoiding the lengthy resolution of those sorts of questions. *See* S.Rep. No. 104-132, at 19, *reprinted in* 1996 U.S.C.C.A.N. 924, 932 ("[I]t is the committee's intent that highly complex issues related to the cause or amount of a victim's loss not be resolved under the provisions of mandatory restitution."). But the language of § 3663(a) does not limit its application only to those instances involving causation or loss.

We agree that the discretionary language of the statute may encompass cases where the assessment of full restitution requires extensive hearings to determine the defendant's financial resources and where, as a result, the sentencing process is inordinately delayed. The record before us does not indicate the level of complexity involved in such a determination here. Without a more fully developed record and specific findings on the complexity of the issues relating to Sellers' ability to pay, we are unable to review the district court's refusal to consider relevant evidence. For these reasons, we remand for reconsideration of the government's request for an evidentiary hearing and for more specific findings.

The court's refusal to consider enhancing Sellers' sentence for obstruction of justice, on the other hand,

directly conflicts with the dictates of the Sentencing Guidelines. We review a sentencing court's factual findings for clear error and its application of the Sentencing Guidelines *de novo*. *United States v. Dean*, 59 F.3d 1479, 1494 (5th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 794, 133 L.Ed.2d 742 (1996). Section 3C1.1 of the U.S. Sentencing Guidelines instructs the court:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instance offense, increase the offense level by 2 levels.

U.S. Sentencing Guidelines Manual § 3C1.1 (1995). One of the examples of the types of conduct to which the enhancement applies includes "providing materially false information to a probation officer in respect to a presentence or other investigation for the court." § 3C1.1 comment. (n.3(h)). The commentary defines "material" information as information "that, if believed, would tend to influence or affect the issue under determination." § 3C1.1 comment. (n.5). This court has recognized that "[t]he application of § 3C1.1 is not discretionary." *See United States v. Humphrey*, 7 F.3d 1186, 1189 (5th Cir.1993) (remanding for factual finding on whether defendant had committed perjury).

The district judge refused to consider evidence supporting an obstruction of justice enhancement. Because she had already decided not to order full restitution, she concluded that any evidence that Sellers misrepresented his financial resources would be immaterial. We disagree. "A statement to a probation officer concerning one's

financial resources will obviously affect the officer's determination of ability to pay." *United States v. Cusumano*, 943 F.2d 305, 316 (3d Cir.1991), *cert. denied*, 502 U.S. 1036, 112 S.Ct. 881, 116 L.Ed.2d 785 (1992). In fact, the probation officer in this case told the court that, "had I discovered there was additional properties out there I would have changed my Pre-Sentence Report to a two point enhancement. I also would have made a recommendation for much higher restitution." Because we are not persuaded that Sellers' alleged misrepresentations to the probation officer were immaterial, we remand for specific factual findings. To resolve this enhancement issue, the district court need not necessarily conduct a full-blown evidentiary hearing to fully unravel Sellers' various financial transactions; rather, it must simply ascertain whether he misrepresented the nature and extent of his financial resources to the probation officer such that an enhancement is warranted.

VII.

In sum, we affirm the convictions of Seller and Dupre on all counts. As to Dupre, we also affirm his sentence. However, we vacate Sellers' sentence and remand for reconsideration of his restitution order and the government's proposal to enhance Sellers' sentence for obstruction of justice.

Accordingly, the judgment of the district court is AFFIRMED in part, VACATED in part, and REMANDED for further proceedings consistent with this opinion.

DENNIS, Circuit Judge, concurring in part and dissenting in part.

I respectfully concur in the majority opinion in affirming the convictions, except that I have difficulty with assuming that the district court committed error in failing to submit the issue of materiality to the jury in its bank fraud instruction without correlatively assuming that materiality is an element of the offense and that the error is now plain. Nevertheless, I concur in the majority's result because I do not believe that, under a complete analysis of the circumstances of the present case, the error affected the defendants' substantial rights or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

I respectfully dissent from the majority's decision to vacate Sellers' sentence and remand for reconsideration of the restitution order. As the majority opinion indicates, 18 U.S.C. § 3663(a)(1)(B)(ii) states that "[t]o the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order." This provision makes it clear that restitution may be declined to the extent that the court finds that the difficulties in fashioning an order outweigh the need for restitution. *See* U.S.S.G. § 5E1.1(b); *U.S. v. Smith*, 944 F.2d 618, 622-23 (9th Cir.1991), *cert. denied*, 503 U.S. 951, 112 S.Ct. 1515, 117 L.Ed.2d 651 (1992); *see also U.S. v. C.R. Bard, Inc.*, 848 F.Supp. 287, 292 (D.Mass.1994); William M. Acker, Jr., Making Sense of Victim Restitution: A Critical Perspective, 6 Fed. Sent. R. 234 (1994). Considering the multiple delays and extended period covered by the sentencing

hearing prior to the government's proffer of new evidence and the additional complication and prolongation of the sentencing process portended thereby, the district court's determination that the difficulties entailed in allowing the opening of new areas of litigation outweighed the need for additional restitution was reasonable and not an abuse of discretion.

I qualifiedly concur in the majority's decision to vacate and remand with respect to the government's proposal to enhance Sellers' sentence. Like the majority, I have been unable to determine whether the alleged false statement was material. Section 3C1.1 of the Guidelines provides that "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels." Application Note 3 thereunder, in pertinent part, provides: "The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies: . . . (h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court." Application Note 5 states: " 'Material' evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination." The alleged false statement would not have been material if the only issue before the court for determination that might have been affected by it was the question of additional restitution, which the district court had reasonably foreclosed in order to avoid excessive prolongation and complication of the sentencing process. *United States v.*

*Cusumano*, 943 F.2d 305, 316 (3d Cir.1991), *cert. denied*, 502 U.S. 1036, 112 S.Ct. 881, 116 L.Ed.2d 785 (1992), may be inapposite because the misstatement of ability to pay there tended to affect the probation officer's recommendation as to fines, an issue still under determination. On the other hand, the alleged false statement in the present case would be material if there were other issues still under determination that the alleged false statement, if believed, would tend to affect.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 95-30275

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UNITED STATES OF AMERICA

Plaintiff – Appellee – Cross-Appellant

v. (Filed Sep. 8, 1997)

ROBERT DUPRE; W HAROLD SELLERS

Defendants – Appellants – Cross-Appellees

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Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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**ON PETITION FOR REHEARING**

Before DAVIS and DENNIS, Circuit Judges, and FALLON,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

**THIRD SUPERSEDING INDICTMENT FOR CONSPIRACY, BANK FRAUD, FALSE STATEMENTS TO A FINANCIAL INSTITUTION AND MONEY LAUNDERING**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | * | CRIMINAL DOCKET NO. 93-327 |
| VERSUS | * | SECTION: "D" (2) |
| W. HAROLD SELLERS | * | |
| ROBERT DUPRE | * | VIOLATIONS: 18 USC §371 |
| MICHAEL J. BARRACK | * | 18 USC §1344 |
| | * | 18 USC §1014 |
| | * | 18 USC §1957 |
| | * | 18 USC §2 |

(Filed Mar. 11, 1994)

* * *

The Grand Jury charges that:

**COUNT 1**

**THE CONSPIRACY**

**A. AT ALL TIMES MATERIAL HEREIN:**

1. Landmark Land Company of California (Landmark of California) was a corporation based in Carmel, California, in the business of real estate and resort development and management. Landmark of California was a wholly owned subsidiary of Oak Tree Savings Bank.

2. Oak Tree Savings Bank was a state chartered savings and loan association based in New Orleans, Louisiana, with accounts insured by the Federal Savings and Loan Insurance Corporation (FSLIC) until August 9, 1989; thereafter, Oak Tree Savings Bank accounts were insured by the Federal Deposit Insurance Corporation (FDIC). The main office and corporate headquarters of Oak Tree Savings Bank was located at 233 Carondelet Street, New Orleans, Louisiana.

3. The FSLIC was a federal government institution which insured member savings and loans against substantial loss with the purpose of preventing savings and loan collapse and instilling public confidence in the Nation's savings and loans. On August 9, 1989 the FDIC replaced the FSLIC in performing this function.

4. Oak Tree Mortgage Corporation was a wholly owned subsidiary of Oak Tree Savings Bank engaged in the business of providing mortgages and to facilitate loans from Oak Tree Savings Bank. Any loan provided by Oak Tree Mortgage Corporation was funded by Oak Tree Savings Bank.

5. LaJolla Pacific Equities, Inc. (LaJolla Pacific) was a California corporation in the business of real estate development. **W. HAROLD SELLERS, ROBERT DUPRE** and **MICHAEL J. BARRACK** were officers, directors and/or employees of LaJolla Pacific.

6. Inland Pacific Real Estate, Inc. (Inland Pacific) was a California corporation in the business of real estate development. **W. HAROLD SELLERS** and **ROBERT DUPRE** were officers and directors of Inland Pacific.

7. Lomas and Nettleton (Lomas) was a Texas mortgage company. Braewood Development Corporation (Braewood) was a wholly owned subsidiary of Lomas in the business of real estate development in Texas, California and elsewhere.

8. Minter Interests, Inc. was a California corporation whose President and Executive Vice President was **W. HAROLD SELLERS.**

9. Underwood Corporation was a California Corporation whose president was **MICHAEL J. BARRACK** and registered agent was **ROBERT DUPRE.**

## B. THE CONSPIRACY

Beginning at a time unknown but prior to in or about June 1987, and continuing until on or about December 31, 1989, in the Eastern District of Louisiana and elsewhere, **W. HAROLD SELLERS, ROBERT DUPRE, MICHAEL J. BARRACK** willfully and knowingly did combine, conspire, confederate and agree together and with each other:

a. to unlawfully and corruptly give, offer and promise to an employee and agent of Oak Tree Savings Bank, a financial institution, something of value, to wit: ONE HUNDRED FIFTY-FIVE THOUSAND AND 00/100 ($155,000.00), with intent to reward said employee and agent, in violation of Title 18, United States Code, Section 215(a)(1);

b. to execute a scheme and artifice to defraud Oak Tree Savings Bank by receiving a $69,000,000 loan and wrongfully diverting approximately $3,000,000 of the proceeds for

their personal use and in the same transaction fraudulently inflating the purchase price of a parcel of land and diverting an additional $4,200,000 to their personal use, as alleged in Count 2, in violation of Title 18, United States Code, Section 1344;

c. to execute a scheme and artifice to defraud Oak Tree Savings Bank by withdrawing $1,500,000 from a $3,816,783 certificate of deposit held by Oak Tree Savings Bank as collateral by falsely representing that the $1,500,000 would be used to purchase property in which Oak Tree Savings Bank would have a security interest and thereafter diverting approximately $810,000 for other purposes, as alleged in Count 3; in violation of Title 18, United States Code, Section 1344;

d. to make false material statements to Oak Tree Savings Bank for the purpose of influencing action on a loan application and substitutions of collateral, in violation of Title 18, United States Code, Section 1014; and

e. to engage in monetary transactions in criminally derived property of a value greater than $10,000, in violation of Title 18, United States Code, Section 1957.

## C. OVERT ACTS:

In furtherance of the conspiracy and to accomplish the purposes thereof, **W. HAROLD SELLERS, ROBERT DUPRE,** and **MICHAEL J. BARRACK** committed the following overt acts, among others, in the Eastern District of Louisiana and elsewhere:

## RANCHO CUCAMONGA/UPPER ETIWANDA

1. On or about March 19, 1987, C R Energy Corporation entered into a purchase agreement with Etiwanda Highland Properties, Ltd. to purchase a 310 acre parcel of land known as "Rancho Cucamonga 300" and/or "Upper Etiwanda" for $5,000 per acre with a $450,000 down payment. On or about June 30, 1988, C R Energy Corporation assigned this purchase agreement to Minter Interests, Inc. for $500,000 and reimbursement of option payments. **W. HAROLD SELLERS**, as Executive Vice President, entered into the agreement on behalf of Minter Interests, Inc.

2. On or about August 5, 1988, the assignment entered into on June 30, 1988, was amended to seek an additional $5,000 reimbursement for costs paid by C R Energy. The amendment was agreed to by **ROBERT DUPRE** acting on behalf of Minter Interests, Inc./Assignee.

3. On August 8, 1988, **W. HAROLD SELLERS**, as President of Minter Interest, Inc., wired to Ontario Savings and Loan, the escrow agent, approximately $647,000 which amount represented the $500,000 assignment purchase price and reimbursement for option payments made by C R Energy.

4. On December 14, 1988, Minter Interests, Inc. purchased the 310 acre parcel of land from Etiwanda Highland Properties, Ltd. for approximately $1,552,650.

5. An "Earnest Money Contract" was submitted to Oak Tree Savings Bank which said that 310 acres (known as "Upper Etiwanda") was being sold by Minter Interest, Inc. to LaJolla Pacific Equities, Inc. **W. HAROLD SELLERS** signed the contract as Executive Vice President of LaJolla Pacific. The contract stated that the purchase price was $20,000 per acre to be paid by LaJolla Pacific to Minter Interest in cash at closing.

6. On December 22, 1988, approximately $4,400,000 was wire transferred by Chicago Land Title Company to Harold Sellers at Century Land Title. $4.2 million of this amount represented a reimbursement for funds claimed to have been expended by LaJolla Pacific to purchase Upper Etiwanda. Instead, approximately $4,200,000 was divided between **SELLERS** and **DUPRE** and wired to their respective domestic accounts and foreign numbered accounts in the Grand Cayman Islands.

**RANCHO CUCAMONGA/LOWER ETIWANDA**

7. On or about June 10, 1987, 453 acres of property in California known as "Rancho Cucamonga," was purchased by Cucamonga Highland I, a California General Partnership. The purchase price was approximately $4,983,000. Rancho Cucamonga was also known as Lower Etiwanda.

8. Then on or about June 19, 1987, Cucamonga Highland I sold the Rancho Cucamonga/Lower Etiwanda property to

Braewood for $10,419,000; on that same day, Braewood sold the property to **SELLERS, DUPRE** and **BARRACK**, d/b/a LaJolla Pacific, for $12,119,650.

9. The sale of the property from Braewood to LaJolla Pacific was financed by Lomas with a loan in the approximate amount of $9,695,720.

## LOMA LINDA

10. On or about June 22, 1987, 689 acres of property in California, known as "Loma Linda," was purchased by Loma Linda Hills, a California General Partnership. The purchase price was approximately $5,512,000.

11. Then or about July 8, 1987, Loma Linda Hills sold the Loma Linda property to Braewood for approximately $20,986,000; on that same day Braewood sold the property to **SELLERS, DUPRE** and **BARRACK** d/b/a LaJolla Pacific for $24,305,900.

12. The sale of the property from Braewood to LaJolla Pacific was financed by Lomas with a loan in the approximate amount of $19,444,720.

13. On or about October 29, 1987, 100 acres of property in California adjoining the Loma Linda property was purchased by Loma Linda 100. The purchase price was approximately $970,000.

14. On or about December 10, 1987, Loma Linda 100, a California General Partnership, sold the 100 acres to Braewood for $3

million; on or about December 11, 1987, Braewood sold the property to **SELLERS, DUPRE** AND **BARRACK** d/b/a LaJolla Pacific for $3,600,000.

15. The sale of property from Braewood to LaJolla Pacific was financed by Lomas with a loan in the approximate amount of $2,880,000.

## SUNRISE RANCH

16. On or about January 29, 1988, 1,043 acres of property in California, known as Sunrise Ranch was purchased by San Bernardino/ Sunrise Partners, a California General Partnership. The purchase price was approximately $10,000,000. On that same day, San Bernardino/Sunrise Partners sold the Sunrise Ranch property to Braewood for $15,000,000; also on that same day, Braewood sold the property to **SELLERS, DUPRE** and **BARRACK** d/b/a LaJolla Pacific for $18,000,000.

17. The sale of property from Braewood to LaJolla Pacific was financed by Lomas with a loan in the approximate amount of $14,400,000.

## MORENO VALLEY

18. On or about July 2, 1987, the First American Financial Corporation sold 156 acres of land known as "Moreno Valley" to Braewood for $3,510,000. On the same day, Braewood sold the property to Underwood Properties, Inc. for $8,800,000.

19. The sale of the property from Braewood to Underwood was financed by Lomas with a loan in the approximate amount of $7,040,000.

20. The Lower Etiwanda, Lomas Linda, Sunrise Ranch and Moreno Valley loans provided for principal and interest reserves and extended periods of times, usually six months to one year, before the first payments were due.

## OTHER TRANSACTIONS

21. After LaJolla Pacific secured the loans with Lomas, **W. HAROLD SELLERS** and **ROBERT DUPRE** d/b/a as LaJolla Pacific negotiated with employees and agents of Oak Tree Savings Bank for a loan to refinance the Lomas debt and for the purchase of "Upper Etiwanda." One object of the negotiations was to close the loan before December 31, 1988.

22. On December 9, 1988, **ROBERT DUPRE** sent to Oak Tree Savings Bank an executed commitment letter wherein it was agreed that Oak Tree Savings Bank would loan to LaJolla Pacific approximately $53,000,000 to refinance debt at Lomas secured by the Lower Etiwanda, Moreno Valley, and Loma Linda properties and to buy Upper Etiwanda.

23. **W. HAROLD SELLERS, ROBERT DUPRE,** and **MICHAEL J. BARRACK** d/b/a LaJolla Pacific, changed the terms of the loan to provide refinancing for the Loma Linda, Moreno Valley, Lower Etiwanda and

Sunrise Ranch properties and for the purchase of Upper Etiwanda, raising the loan amount to approximately $69,000,000.

24. On December 21, 1988, Oak Tree Savings Bank sent to Chicago Title, a real estate transfer company, via wire transfer, loan proceeds in the amount of $60,814,475.

25. On December 22, 1988, Chicago Title disbursed Oak Tree Savings Bank loan proceeds in the amount of $55,880,659 to Lomas for the purpose of paying off the debt which existed against the Loma Linda, Lower Etiwanda, Moreno Valley and Sunrise Ranch properties.

26. On the same day as the loan closing, December 22, 1988, **SELLERS, DUPRE** and **BARRACK** executed an "Agreement to Settle and Mutual Release" wherein Lomas agreed to discount its loan balance by $3,000,000. **SELLERS, DUPRE** and **BARRACK** did not tell Oak Tree Savings Bank about the agreement with Lomas causing Oak Tree Savings Bank to remit to Lomas $55,880,659 instead of $52,880,659.

27. On or about December 22, 1988, **SELLERS,** and **DUPRE** gave a $75,000 check to an employee and agent of Oak Tree Savings Bank as a reward for his efforts in expediting the loan.

28. On or about December 23, 1988, **SELLERS** telephoned Chicago Title demanding to know why $3,000,000 had not been disbursed to him. Upon learning that the $3,000,000 had been disbursed to Lomas, **SELLERS** then phoned Lomas and

demanded that the money be wired to **SELLERS** "Century Land Title" account in Texas. The $3,000,000 was wired from Lomas to **SELLERS** c/o Century Land Title; from there the $3,000,000 was divided equally between **SELLERS, BARRACK,** and **DUPRE** and wired to their foreign numbered accounts in the Grand Cayman Islands.

29. On March 15, 1989, LaJolla entered into an agreement for purchase and sale with Landmark of California wherein LaJolla agreed to sell the Lower and Upper Etiwanda property for approximately $19,188,069. This amount represented the payoff of the loan balance on the property in the amount of approximately $15,371,286 and profits to LaJolla Pacific in the amount of $3,816,783. Oak Tree Savings Bank required that LaJolla Pacific place its $3,816,783 in profits from the sale in a jointly held certificate of deposit as additional collateral for the loans remaining with Oak Tree Savings Bank.

30. In or about April 1989, **W. HAROLD SELLERS** and **ROBERT DUPRE** d/b/a as Inland Pacific negotiated with employees and agents of Oak Tree Savings Bank for a loan to purchase a tract of land known as "Willow Springs." The $3,816,783 certificate of deposit referred to in Overt Act 29 was used as additional collateral for the "Willow Spring" loan.

31. On or about May 8, 1989, Oak Tree Savings Bank sent a letter to **W. HAROLD SELLERS** and **ROBERT DUPRE,** d/b/a

Inland Pacific, committing to loan them $16,500,000 to purchase the "Willow Springs" property.

32. On or about June 15, 1989, Oak Tree Savings Bank wired proceeds in the amount of $12,527,500 to Chicago Title Company to fund the loan to **W. HAROLD SELLERS** and **ROBERT DUPRE** d/b/a Inland Pacific.

33. On or about June 20, 1989, **W. HAROLD SELLERS** and **ROBERT DUPRE** gave to an employee and agent of Oak Tree Savings Bank an $80,000 check drawn on the account of Inland Pacific checking account and signed by **W. HAROLD SELLERS.**

34. On or about August 17, 1989, **W. HAROLD SELLERS** and **ROBERT DUPRE** requested a release of $1,500,000 of the $3,816,783 collateral certificate of deposit held by Oak Tree Savings Bank for the purpose of making down payments on three parcels of property in southern California. In return, Oak Tree Savings Bank required, and LaJolla Pacific, **SELLERS** and **DUPRE** agreed to provide Oak Tree Savings Bank with, documentation and updates of the purchases. Furthermore, Oak Tree Savings Bank, **SELLERS** and **DUPRE** agreed that, to secure its collateral position, Oak Tree Savings Bank would share in the profits of any subsequent sale of these properties LaJolla Pacific, **SELLERS** and **DUPRE** said they were purchasing with the $1,500,000 withdrawal.

35. **W. HAROLD SELLERS** sent to Oak Tree Savings Bank copies of various contracts in

support of his request for the $1,500,000 withdrawal from the certificate of deposit. **W. HAROLD SELLERS** also provided Oak Tree Savings Bank with a LaJolla Pacific corporate resolution wherein **W. HAROLD SELLERS, ROBERT DUPRE** and **MICHAEL J. BARRACK** each authorized LaJolla Pacific to withdraw the funds and to purchase four specific parcels of land.

36. On or about August 22, 1989, **W. HAROLD SELLERS** amended his request regarding the $1,500,000 withdrawal by informing Oak Tree Savings Bank that four properties would be purchased with the funds and that all requirements previously agreed to would apply to the fourth property.

37. On or about August 28, 1989, approximately $810,000 of the $1,500,000 withdrawn from the certificate of deposit was deposited into the bank account of Inland Pacific and used by **W. HAROLD SELLERS** and **ROBERT DUPRE** for purposes other than those represented to and approved by Oak Tree Savings Bank.

All in violation of Title 18, United States Code, Section 371.

## COUNT 2

## BANK FRAUD

**A.** Section A of Count 1 is hereby incorporated as though fully set forth herein.

**B. THE SCHEME:**

Beginning at a time unknown but prior to in or about June 1987 and continuing until December 31, 1989, in the Eastern District of Louisiana and elsewhere, **W. HAROLD SELLERS, ROBERT DUPRE,** and **MICHAEL J. BARRACK** did knowingly devise and intend to devise a scheme and artifice to defraud Oak Tree Savings Bank and obtain money and funds owned by and in the custody and control of Oak Tree Savings Bank by means of false and fraudulent pretenses, representations and promises by applying for and receiving a loan in the approximate amount of $69,000,000, to be used for the purposes set forth in the loan documentations submitted to Oak Tree Savings Bank when in truth and in fact, **W. HAROLD SELLERS, ROBERT DUPRE,** and **MICHAEL J. BARRACK** concealed from Oak Tree Savings Bank that portions of the proceeds of the $69,000,000 loan would be diverted to their personal benefit and would not be utilized for the purpose and in the manner set forth in the loan documentation.

**C. THE EXECUTION:**

On or about December 22, 1988, in the Eastern District of Louisiana and elsewhere, **W. HAROLD SELLERS, ROBERT DUPRE,** and **MICHAEL J. BARRACK** did knowingly execute and attempt to execute the above described scheme and artifice to defraud the Oak Tree Savings Bank when the defendants caused the disbursement of the $69,000,000 loan in the name of LaJolla Pacific Equities, Inc.; all in violation of Title 18, United States Code, Section 1344 and 2.

## COUNT 3

## BANK FRAUD

A. Section A of Count 1 is hereby incorporated as though fully set forth herein.

B. THE SCHEME:

Between on or August 17, 1989 and January 11, 1990, in the Eastern District of Louisiana and elsewhere, **W. HAROLD SELLERS** and **ROBERT DUPRE** did knowingly devise and intend to devise a scheme and artifice to defraud Oak Tree Savings Bank and obtain money and funds owned by and in the custody and control of Oak Tree Savings Bank by means of false and fraudulent pretenses, representations and promises by withdrawing $1,500,000 from a $3,816,783 certificate of deposit held by Oak Tree Savings Bank as additional collateral against the $69,000.000 loan and representing that the $1,500,000 would be used to purchase property in which Oak Tree Savings Bank would have an interest. Instead, approximately $810,000 of the $1,500,000 withdrawal was diverted to Inland Pacific by **SELLERS** and **DUPRE** for uses other than those represented to and approved by Oak Tree Savings Bank.

C. THE EXECUTION:

On or about August 23, 1989, in the Eastern District of Louisiana and elsewhere, **W. HAROLD SELLERS** and **ROBERT DUPRE** did knowingly execute and attempt to execute a scheme set forth in paragraph B above by causing Oak Tree Savings Bank to wire $1,500,000 from

New Orleans, Louisiana, to California; all in violation of Title 18, United States Code, Sections 1344 and 2.

## COUNT 4

## FALSE STATEMENT

**A.** Section A of Count 1 is hereby incorporated as though fully set forth herein.

**B.** On or about December 15, 1988, **W. HAROLD SELLERS, ROBERT DUPRE** and **MICHAEL J. BARRACK** knowingly made and caused to be made a false material statement for the purpose of influencing the action of Oak Tree Savings Bank upon the application of a loan in that **SELLERS, DUPRE** and **BARRACK** misrepresented the purchase price of a parcel of land; all in violation of Title 18, United States Code, Sections 1014 and 2.

## COUNT 5

## FALSE STATEMENT

**A.** Section A of Count 1 is hereby incorporated as though fully set forth herein.

**B.** On or about December 22, 1988, **W. HAROLD SELLERS, ROBERT DUPRE** and **MICHAEL J. BARRACK** knowingly made and caused to be made a false material statement for the purpose of influencing the action of Oak Tree Savings Bank upon the application of a loan in that **SELLERS, DUPRE** and **BARRACK** misrepresented the amount required to refinance a pre-existing loan; all in violation of Title 18, United States Code, Sections 1014 and 2.

## COUNT 6

## FALSE STATEMENT

**A.** Section A of Count 1 is hereby incorporated as though fully set forth herein.

**B.** On or about August 17, 1989, **W. HAROLD SELLERS and ROBERT DUPRE** knowingly made and caused to be made a false material statement for the purpose of influencing the action of Oak Tree Savings Bank upon the substitution of security in that **SELLERS** and **DUPRE** caused the release of $1,500,000 of collateral which they stated would be used for purchases of substitute collateral; instead, approximately $810,000 was used for purposes for which Oak Tree Savings Bank was unaware; all in violation of Title 18, United States Code, Sections 1014 and 2.

## COUNTS 7 THROUGH 15

## MONEY LAUNDERING

**A.** Section A of Count 1 is hereby incorporated as though fully set forth herein.

**B.** On or about the below listed dates, in the Eastern District of Louisiana and elsewhere, the following identified defendants did knowingly engage and attempt to engage in monetary transactions, affecting interstate and foreign commerce, in criminally derived property with a value greater than $10,000.00, that is, wire transfers in the following amounts from a domestic bank in Houston, Texas to the following foreign and domestic accounts, such property having been derived from a specified unlawful activity, that is bank fraud as charged in Count 2:

| COUNTS | DEFENDANT | |
|---|---|---|
| Count 7 | W. Harold Sellers<br>Robert Dupre | 1 |
| Count 8 | W. Harold Sellers<br>Robert Dupre | 1 |
| Count 9 | W. Harold Sellers<br>Robert Dupre | 1 |
| Count 10 | W. Harold Sellers<br>Robert Dupre | 1 |
| Count 11 | W. Harold Sellers<br>Robert Dupre | 1 |
| Count 12 | W. Harold Sellers<br>Robert Dupre | 1 |
| Count 13 | W. Harold Sellers<br>Robert Dupre<br>Michael J. Barrack | 1 |
| Count 14 | W. Harold Sellers<br>Robert Dupre<br>Michael J. Barrack | 1 |
| Count 15 | W. Harold Sellers<br>Robert Dupre<br>Michael J. Barrack | 1 |

All in violation of Title 18, United States Code, Sections 1

| DATE | AMOUNT | ACCOUNT |
|---|---|---|
| /23/88 | $ 200,000 | California First Bank (CA)<br>Newport Beach, California<br>Acct. No. 0711288795 |
| /23/88 | $ 300,000 | Coussoulis Development Company<br>Bank of San Bernardino<br>San Bernardino, California<br>Acct. No. 10012201 |
| /23/88 | $ 300,000 | W. Harold Sellers,<br>Attorney at Law<br>Mason Road Bank<br>Katy, Texas<br>Account No. 8020-0249 |
| /23/88 | $ 425,000 | Robert Dupre<br>American Interstate Bank<br>Newport Beach, California<br>Account No. 002-062445 |
| /23/88 | $1,400,000 | 71 Company<br>Canadian Imperial Bank<br>Grand Cayman Islands<br>British West Indies |
| /23/88 | $1,650,000 | 35 Company<br>Canadian Imperial Bank<br>Grand Cayman Islands<br>British West Indies |
| /27/88 | $ 931,821 | 71 Company<br>Canadian Imperial Bank<br>Grand Cayman Islands<br>British West Indies |
| /27/88 | $ 931,821 | 35 Company<br>Canadian Imperial Bank<br>Grand Cayman Islands<br>British West Indies |
| /27/88 | $ 931,821 | 22 Company<br>Canadian Imperial Bank<br>Grand Cayman Islands<br>British West Indies |

57 and 2.

## COUNT 16

## CRIMINAL FORFEITURE OF LAUNDERED FUNDS

**A.** The allegations contained in Counts 7, 8, 9, 10, 11, 12, 13, 14 and 15 herein are hereby incorporated as though fully set forth herein for the purpose of charging criminal forfeiture to the United States of America pursuant to Title 18, United States Code, Section 982.

**B.** As a result of being convicted of Counts 7, 8, 9, 10, 11, 12, 13, 14 and 15 herein, **HAROLD SELLERS** and **ROBERT DUPRE**, and, as a result of being convicted of Counts 9, 10 and 11 herein, **MICHAEL J. BARRACK** shall forfeit to the United States all property, real and personal, involved in the aforesaid offenses and all property representing proceeds of those offenses and such property traceable to those proceeds, as to which the said defendants are jointly and severally liable including but not limited to:

| Defendant | Count | Amount |
|---|---|---|
| W. Harold Sellers | 7 | $ 200,000 |
| W. Harold Sellers | 8 | $ 300,000 |
| W. Harold Sellers | 9 | $ 300,000 |
| W. Harold Sellers | 10 | $ 425,000 |
| W. Harold Sellers | 11 | $1,400,000 |
| W. Harold Sellers | 12 | $1,650,000 |
| W. Harold Sellers | 13 | $ 931,821 |
| W. Harold Sellers | 14 | $ 931,821 |
| W. Harold Sellers | 15 | $ 931,821 |

| | | |
|---|---|---|
| **TOTAL FORFEITABLE AMOUNT FOR W. HAROLD SELLERS** | | **$7,068,000** |
| Robert Dupre | 7 | $ 200,000 |
| Robert Dupre | 8 | $ 300,000 |
| Robert Dupre | 9 | $ 300,000 |
| Robert Dupre | 10 | $ 425,000 |
| Robert Dupre | 11 | $1,400,000 |
| Robert Dupre | 12 | $1,650,000 |
| Robert Dupre | 13 | $ 931,821 |
| Robert Dupre | 14 | $ 931,821 |
| Robert Dupre | 15 | $ 931,821 |
| **TOTAL FORFEITABLE AMOUNT FOR ROBERT DUPRE** | | **$7,068,000** |
| Michael Barrack | 13 | $ 931,821 |
| Michael Barrack | 14 | $ 931,821 |
| Michael Barrack | 15 | $ 931,821 |
| **TOTAL FORFEITABLE AMOUNT FOR MICHAEL J. BARRACK** | | **$2,795,463** |

C. If any of the above-described forfeited property, as a result of any act or omission of the defendants,

a. cannot be located upon the exercise of due diligence;

b. has been transferred, sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty;

It is the intent of the United States, pursuant to Title 18, United States Code, Section 982(b) to seek forfeiture of any other property of said defendants up to the value of the above forfeitable property;

All in violation of Title 18, United States Code, Section 982.

A TRUE BILL:

/s/ Illegible
FOREPERSON

/s/ Robert J. Boitman
ROBERT J. BOITMANN
UNITED STATES ATTORNEY
Bar Roll No. 3190

/s/ Jan Maselli Mann
JAN MASELLI MANN
Assistant United States Attorney
Chief, Criminal Division
Bar Roll No. 9020

/s/ Patrice M. Harris
PATRICE M. HARRIS
Assistant United States Attorney
Bar Roll No. 14987

/s/ Salvador R. Perricone
SALVADOR R. PERRICONE
Assistant United States Attorney
Bar Roll No. 10515

New Orleans, Louisiana
March 11, 1994

RELEVANT PORTIONS OF THE DISTRICT COURT'S JURY INSTRUCTIONS, "U.S. V DUPRE," NO. 93-327, USDC, EASTERN DISTRICT OF LOUISIANA, TRANSCRIPT, AUGUST 17, 1994, VOLUME 14, PP. 3281 – 3307

* * *

[p. 3281] THE COURT: All right. Members of the jury, you have heard all the evidence in the case, as well as the final arguments of the lawyers for the parties. It becomes my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision . . .

* * *

[p. 3288] In this case, as you know, the indictment alleges 15 separate offenses called counts. I will not read it to you again because a copy of the indictment will be available to [p. 3289] you for study during your deliberations.

Count 1 charges that the defendants knowingly and willfully conspired to commit various offenses against the United States in violation of Title 18, United States Code, Section 371.

Counts 2 and 3 charge that the defendants knowingly and willfully executed or attempted to execute a scheme to defraud Oak Tree Savings Bank in violation of Title 18, United States Code, Sections 1344 and 2.

In Counts 4 through 6, the defendants are charged with making false statements to Oak Tree Savings Bank for the purpose of influencing the bank on an application

for a loan as to Counts 4 and 5, and for the substitution of security as to Count 6, in violation of Title 18, United States Code, Sections 1014 and 2.

In Counts 7 through 15, the defendants are charged with knowingly engaging and attempting to engage in monetary transactions in criminally derived property, in violation of Title 18, United States Code, Sections 1957 and 2.

Now, Count 1 charges the defendants with criminal conspiracy. Counts 2 through 15 alleged so-called substantive offenses. I will explain the law and essential elements of the substantive offenses in a moment.

First, however, as to Count 1, you will note that the defendants are not charged with violating the underlying [p. 3290] substantive offenses set forth in the remaining counts as such. Rather, the defendants are charged with having conspired to do so, a separate offense, in violation of Title 18, United States Code, Section 371.

Title 18, U. S. Code, Section 371, makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States. In this case the defendants are charged with conspiring to give an unlawful reward to an agent of a financial institution, to commit bank fraud, to make false statements to a federally insured financial institution, and to engage in monetary transactions in criminally derived property.

A conspiracy is an agreement between two or more persons to join together to accomplish some unlawful purpose.

It is kind of a partnership in crime in which any member becomes an agent of every other member.

For you to find the defendants guilty of this crime, you must first be convinced that the government has proven each of the following beyond a reasonable doubt.

First, that two or more persons made an agreement to commit the following crimes: Giving an unlawful reward to an agent of a financial institution, bank fraud, making false statements to a federally insured financial institution, and engaging in monetary transactions in criminally derived property; second, that the defendants knew the unlawful [p. 3291] purpose of the agreement, and joined if it willfully, that is, with the intent to further the unlawful purpose; and, third, that one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment in order to accomplish some object or purpose of the conspiracy.

With regard to the giving of an unlawful reward in violation of Title 18, United States Code, Section 215 (a) (1), you must be convinced that the government has proved beyond a reasonable doubt that the defendants agreed to do each of the following: One, to give something of value in excess of one hundred dollars to John Ohanian; two, to do so corruptly, with the intent to reward an employee or agent of the financial institution in connection with any business or transaction of that institution.

An act is corruptly done if it is done intentionally, with an unlawful purpose. In order to find the defendant's guilty of conspiring to reward Mr. Ohanian as an

agent of Oak Tree Savings Bank, you must believe beyond a reasonable doubt that Mr. Ohanian was in fact an employee or agent of Oak Tree Savings Bank at the time of each alleged payment.

An agent is a person authorized by another, the principal, to act for or in place of him, one entrusted with another's business, or a representative whose function is to bring about, modify, affect, accept performance of, or terminate [p. 3292] contractual obligations between principals and third persons.

I will explain the elements of the other objects of the conspiracy later in these instructions, because they are also charged with substantive defenses.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of the other alleged conspirators. If a defendant understands the unlawful nature of the plan or scheme, and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him of conspiracy even though the defendant had not participated before or even though the defendant played a minor part.

The government need not show that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all the details of the schemes alleged in the indictment were actually agreed upon or carried out, nor must it be proved that all the persons alleged to have been members of the conspiracy were such, or that the alleged

conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of the event, even with the knowledge that the crime is being committed, or that the mere fact that certain persons may be associated with each other, and may have assembled together and discussed common aims and [p. 3293] interest, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but happens to act in any way which advances some purpose of the conspiracy, does not thereby become a conspirator.

In Count 2 the government charges that the defendants violated Title 18, U. S. Code, 1344 in connection with the December 1988 loan.

In Count 3, the government charges that the defendants violated Title 18, United States Code, Section 1344 in connection with the August 1989 release of collateral.

In order to convict either of the defendants of the charges contained in Counts 2 and 3, you must find that the government has proved beyond a reasonable doubt, one, that each defendant knowingly executed or attempted to execute a scheme or artifice to defraud Oak Tree Savings Bank; two, that as a part of the scheme the defendants obtained money or property, or attempted to obtain money or property, under the custody or control of Oak Tree Savings Bank by means of false pretenses, representations or promises; three, that the defendants acted with the specific intent to commit fraud; and, four, that the scheme was perpetrated against a financial institution, the accounts of which were federally insured.

The word scheme includes any plan or cause of action intended to deceive others, and to obtain by false or [p. 3294] fraudulent pretenses, representations or promises, money or property from the financial institution which has been deceived.

To act with intent to defraud means to act with intent to deceive or cheat someone, ordinarily for the purpose of causing some financial loss to the financial institution, or to bring about some financial gain to oneself. Furthermore, it's not necessary that a financial institution suffer financial loss to support a conviction for bank fraud under the statute as charged in Counts 2 and 3. It is only necessary to prove that the fraudulent scheme or artifice placed the bank at risk of loss.

In count 4, the government charges that the defendants violated Title 18, Section 1014 by misrepresenting the purchase price of a parcel of land.

In Count 5, the government charges that the defendants violated Title 18, U. S. Code, Section 1014 by misrepresenting the amount required to refinance a loan.

In Count 6, the government charges that the defendants violated Title 18, U. S. Code, Section 1014 by failing to use released collateral as agreed.

In order to convict the defendants of the charges contained in Counts 4, 5 and 6, you must conclude the following beyond a reasonable doubt. One, that Oak Tree Savings Bank was a federally insured financial institution; [p. 3295] two, that the defendants made false statements to Oak Tree Savings Bank; three, that the defendants made the statements knowing that they were

false; and four, that the defendants did so for the purpose of convincing the bank to give the defendants a loan as to Counts 4 and 5, and for the purpose of substituting security as to Count 6.

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. What must be proven is that the defendants intended to influence the bank by the false statement.

If you find that the government has proved these things, you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide.

Counts 1(B) (b&c), 2 and 3, bank fraud and conspiracy to commit bank fraud, and Counts 1(B) (d), 4, 5 and 6, false statements and conspiracy to make false statements, require that the government prove beyond a reasonable doubt that the defendants intended to defraud or make false statements to a financial institution. Count 1(B) (a) requires that the government prove beyond a reasonable doubt that Mr. Ohanian was an employee or agent of a financial institution. A financial institution is a bank or savings association whose deposits are insured by the federal government. The [p. 3296] government must prove beyond a reasonable doubt that the accounts of the financial institution were federally insured at the time of each particular alleged offense. If the government has failed to prove this element with regard to any count, you must find the defendants not guilty.

In order to find the defendants guilty of making false statements to a federally insured financial institution,

Counts 4, 5 and 6; committing bank fraud, Counts 2 and 3; or conspiring to make false statements and commit bank fraud, Count 1(B), (b, c, and d), the government must prove beyond a reasonable doubt that the defendants intended that their alleged false statements be relied upon by a federally insured institution. It's not necessary for the government to prove that the institution in fact relied on the statement. If the government proves only that the defendants intended to defraud or make false statements to a nonfederally insured subsidiary of a federally insured bank, you must find the defendants not guilty. To make a false statement to a federally insured savings and loan institution, the defendant need not directly submit the false statement to the institution. It is sufficient that the defendants submit the statement to a third party, knowing that the third party will submit the false statement to the federally insured savings and loan association.

If you conclude that, during the process of applying for [p. 3297] and receiving a loan, the defendants knew that any loan proceeds would ultimately be provided from Oak Tree Savings Bank, and you conclude that Oak Tree Savings Bank was federally insured, then you can conclude that they intended to influence a federally insured financial institution . . .

* * *

[p. 3301] The word knowingly, as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident. You may find that a defendant had knowledge of a fact if you find that the

defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

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## RELEVANT PORTIONS OF PROPOSED JURY INSTRUCTIONS SUBMITTED BY DEFENDANTS ROBERT DUPRE AND W. HAROLD SELLERS

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### REQUIREMENT OF MATERIALITY

In order to find Mr. Sellers and Mr. Dupre guilty of making false statements to a federally insured financial institution (Counts 4, 5 & 6), committing bank fraud (Counts 2 & 3) or conspiring to make false statements and commit bank fraud (Count 1(B)(b, c & d), the government must prove beyond a reasonable doubt that the statements and/or the false or fraudulent pretenses were material. A statement is material if it is capable of influencing the decision of the financial institution. The appropriate question to ask is, "if the bank had relied on the defendant's statements, would it have made any difference?

*United States v. Williams*, 12 F.3d 452, 457 (5th Cir. 1994). (18 U.S.C. § 1014)

*United States v. Heath*, 970 F.2d 1397, 1402-03 (5th Cir. 1992). (18 U.S.C. § 1344).

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### CONSPIRACY ELEMENT #1 – AGREEMENT TO COMMIT UNLAWFUL OBJECTIVES

The government has charged in Count 1 a single conspiracy with five distinct unlawful objectives. You must find that the government proved each element of the alleged conspiracy beyond a reasonable doubt.

First, you must find that two or more persons made an agreement to commit each of the following unlawful objectives[1]:

OBJECTIVE #1

The first alleged objective of the conspiracy in Count 1 relates to a check written by La Jolla Pacific Equities, Inc. and a check written by Inland Pacific Real Estate, Inc. to John Ohanian in 1988 and 1989. The government has charged that Mr. Sellers and Mr. Dupre conspired with others to violate Title 18, United States Code, Section 215(a)(1).

For you to believe that Mr. Sellers and Mr. Dupre are guilty of conspiring to commit violate section 215(a)(1), you must be convinced that the government has proved that the defendants agreed to each of the following:

First: That Mr. Sellers and Mr. Dupre gave something of value in excess of $100 to John Ohanian; and

Second: That the defendant did so corruptly with the intent to reward an employee or agent of the financial institution in connection with any business or transaction of that institution.

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[1] A careful reading of the government's indictment indicates that the government asserted the various alleged objectives in the conjunctive through inserting only semicolons and a final "and" between the objectives of the conspiracy. The government has therefore assumed the burden of proving each alleged objective in order to obtain a guilty verdict as to Count 1.

In order to find Mr. Sellers and Mr. Dupre guilty of rewarding an officer or agent of a financial institution, you must find that the money paid to John Ohanian was "corruptly" given. An act corruptly done is one which is done, "voluntarily and intentionally, and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means. The motive to act corruptly is ordinarily a hope or expectation of either financial gain or other benefit to oneself or some profit or benefit to another.

*United States v. McElroy*, 910 F.2d 1016, 1021 (2nd Cir. 1990) (citing *United States v. Brunson*, 882 F.2d 151, 154 n.2 (5th Cir. 1989)).

In order to find Mr. Sellers and Mr. Dupre guilty of rewarding Mr. Ohanian as an agent of Oak Tree Savings Bank, you must believe beyond a reasonable doubt that Mr. Ohanian was in fact an employee or agent of Oak Tree Savings Bank at the time of each alleged payment. In order to be an agent, one must have discretionary authority on behalf of Oak Tree Savings Bank including the ability to alter the legal relations between the Oak Tree Savings Bank and LaJolla Pacific Equities, Inc. and Inland Pacific Real Estate, Inc.

*United States v. Moeller*, 987 F.2d 1134, 1137-38 (5th Cir. 1993).

*Restatement (2d) Agency* § 12 at 57 (1958).

An employee or agent is not someone who is merely connected in some capacity with a financial institution.

*Compare* 18 U.S.C. § 215(a)(1) *with* 18 U.S.C. §§ 656, 657, 1005 & 1006 (sections 656, 657, 1005 & 1006 include "connected in same capacity" language while section 215 does not).

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**ORAL OBJECTIONS OF DEFENDANTS SELLARS AND DUPRE TO THE DISTRICT COURT'S JURY INSTRUCTION, TRANSCRIPT, AUGUST 17, 1994, VOLUME 14, PP. 3310-3312**

[p. 3310] deliberate tonight, and let us know that fairly soon. That can be their first major decision. Anything else for the government?

THE COURT: Mr. Johnson.

MR. JOHNSON: Mr. Chinn is going to speak for me. I've done enough today.

THE COURT: All right.

MR. CHINN: I'd just like to note for the record that yesterday we provided the Court and opposing counsel with a proffer of our proposed instructions. And, so, to the extent that we have an objection I'm going to refer to those proffered instructions, and I believe now a copy of those has been also filed with the clerk of the Court. So I won't go through, I'm not going to make the proffer of an alternative instruction here if we've already made one.

THE COURT: Okay.

MR. CHINN: The conspiracy. Your Honor. I realize – this is my chance to talk on the record.

THE COURT: That's right. Instead of being the "S" on attorneys for Mr. Sellers. Go ahead.

MR. CHINN: I hadn't thought of it that way.

THE COURT: That's how I spent my career.

MR. CHINN: I've only been at it two years. I'm hoping to move up at some point. I don't know if I'll ever make it as far as you have.

[p. 3311] THE COURT: Thank you. Page 18?

MR. CHINN: Page 18. Page 19, actually. We object to the definition of corruptly, realizing that is the Fifth Circuit pattern instruction, we have made a proffer of an alternative instruction that we believe more adequately stated the definition. As far as the definition of agent that's been added, to some degree at our request, we would merely object to the use of the disjunctive with the "or." We believe that the definition of agent encompasses the entire description there. The two uses of "or." And that's reflected also in the proffer that we've made.

As to the false statements on page 23, we object to the failure to instruct the jury on materiality, and we included a proffer on that, and it will be filed with the Court. It's the position of the defendants that the failure to charge on that issue is vital the defendants' right to a jury trial in that element to that offense.

As to page 26, the necessity that the defendants intend their statements to be relied upon, defendants object to the final paragraph as being cumulative of the paragraph before it, and as simplifying the government's burden on that count. It suggests that that's all they have to prove in order to prove a false statement or a fraud, that is, ultimately loan proceeds would be provided from Oak Tree Savings Bank, and we believe that's a misstatement of the law.

[p. 3312] Judge, can you help me? Where did you insert the deliberate ignorance?

THE COURT: It's knowingly. It's page 34.

MR. CHINN: 24?

THE COURT: 34.

MR. CHINN: 34. Mr. Sellers objects to the instruction on willful blindness to the extent that it might allow the jury to make a finding of guilt with a lesser mens rea showing than knowing.

THE COURT: Okay.

MR. CHINN: I think it was in the duty to deliberate. We asked for an instruction regarding a unanimous verdict as to the overt act in conspiracy. That request was turned down. However, we didn't make a proffer on that. So I'd like to make a proffer now. The defense would request that an instruction similar to the instruction given as to the object of the conspiracy, stating that in order to find the defendant's guilty of conspiracy, the jurors must be unanimous as to the commission of at least one overt act.

THE COURT: Okay.

MR. JOHNSON: I have one other, just a housekeeping matter, your Honor. We attempted to file a copy of our proposed instructions with the clerk. It was not accepted, perhaps because there was not an enclosed or attached memorandum in support thereof. We have tendered a copy

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## U.S. CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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## U.S. CONSTITUTION AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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**18 U.S.C. § 215. Receipt of commissions or gifts for procuring loans**

**(a) Whoever –**

(1) corruptly gives, offers, or promises anything of value to any person, with intent to influence or reward an officer, director, employee, agent, or attorney of a financial institution in connection with any business or transaction of such institution; . . .

shall be fined not more than $1,000,000 or three times the value of the thing given, offered, promised, solicited, demanded, accepted, or agreed to be accepted, whichever is greater, or imprisoned not more than 30 years, or both, but if the value of the thing given, offered, promised, solicited, demanded, accepted, or agreed to be accepted does not exceed $100, shall be fined under this title or imprisoned not more than one year, or both.

[(b) Transferred]

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**18 U.S.C. § 1014. Loan and credit applications generally; renewals and discounts; crop insurance**

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation or a

company the Corporation reinsures, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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**18 U.S.C. § 1344. Bank fraud**

Whoever knowingly executes, or attempts to execute, a scheme or artifice

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.